82-1938

No. 82-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the rule of Illinois Brick Company v. Illinois bar Clayton Act section 4 claims of retail purchasers against manufacturers where the manufacturers horizontally agreed to raise retail prices, but where the manufacturers sold to retail purchasers indirectly through captive intermediary dealers?

2. Does Illinois Brick apply to preclude claims by retail purchasers where there is no wholesale market in which the price fixers compete?

THE PARTIES BELOW

Petitioners, who were Appellees in the Court of Appeals, are the States of California, Arizona, Florida, Oregon and Washington. The Petitioner States are plaintiffs in the District Court. Respondents, Appellants in the Court of Appeals, are defendants in In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL-150 WPG, which is pending in the United States District Court for the Central District of California.*/

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*/ The Respondents are: Atlantic Richfield Company; Cities Service Company and Cities Service Oil Company; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Standard Oil Company of California; Standard Oil Company (Indiana); Standard Oil Company (Ohio); Sun Oil Company, Inc.; Texaco, Inc.; and Union Oil Company of California.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The States of California, Arizona, Florida, Oregon, and Washington, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on November 9, 1982.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 691 F.2d 1335 (attached as Appendix A). The District Court's opinions are reported at 523 F.Supp. 1116 (attached as Appendix B), and 497 F.Supp. 218 (attached as Appendix C).

JURISDICTION

The Court of Appeals entered its opinion on November 9, 1982. Petitioners' timely petition for rehearing was denied on March 1, 1983, and this petition for certiorari was filed within ninety days of that date. Petitioners invoke this Court's jurisdiction under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

This case involves 15 U.S.C. section 1 (Sherman Act §1) and 15 U.S.C. section 15 (Clayton Act §4), set out verbatim in Appendices D and E, respectively.

STATEMENT OF CASE

The decisions below present a new and troubling application of the doctrine of Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, an application which frustrates the antitrust enforcement efforts of five state attorneys general and which immunizes an economically powerful industry from antitrust liability.

Petitioners Arizona, California, Florida, Oregon, and Washington (hereinafter plaintiffs) brought these antitrust actions at various times from 1973 to 1977. The States sued on their own behalf, on behalf of alleged classes of natural persons on behalf of alleged classes of governmental entities, and as parens patriae on behalf of their citizens

pursuant to 15 U.S.C. section 15c.1/ The federal courts have jurisdiction over the claims at issue in this petition pursuant to 15 U.S.C. section 1337.

The complaints charge 15 major oil companies (defendants) with retail price-fixing of refined petroleum products, primarily motor gasoline and heating fuel, in violation of the Sherman Act section 1 (15 U.S.C. § 1). They seek recovery for the States, their classes, and their citizens pursuant to Clayton Act section 4 (15 U.S.C. § 15) and the parens patriae statute (15 U.S.C. § 15c) for overcharges attributable to horizontal retail price-fixing by defendants and their co-conspirators. Plaintiffs also seek to recover the damages that they, their classes, and their citizens suffered due to elevated prices charged by non-conspiring unbranded stations, which were able to raise their retail prices under the umbrella of defendants' price-fixing.

1/ Although plaintiffs have brought these actions as parens patriae, the bulk of the damages suffered by consumers occurred before September 30, 1976, the effective date of the parens patriae statute. Thus, most of the consumer claims can only be maintained in a class action under Federal Rules of Civil Procedure, Rule 23.

Defendants are major integrated oil companies that produce and buy crude oil, refine it into gasoline and other products, and sell these products in bulk to governmental and commercial accounts and at branded retail outlets to the motoring public. Defendants owned most of these retail outlets and operated some of them with their own employees, but almost all of the branded retail outlets were actually operated by franchised dealers. While these dealers were nominally independent businesses, they in fact sold gasoline solely with defendants' permission, which could be withdrawn at any time.

In particular, the dealers could sell only their franchisor's brand of gasoline, so that there was never an intervening wholesale market between defendants and their dealers. Defendants could not and did not compete with each other for sales to dealers. While defendants purported not to set the precise retail price charged by their dealers, they in fact suggested retail prices to their dealers, strongly counseled them to post these prices, and disciplined and terminated dealers who did not maintain proper price levels.

Because there was no wholesale market for sales to dealers, and because the independence of defendants' dealers was illusory, defendants conspired among themselves to raise and stabilize prices in the retail market for gasoline, the only market in which they competed. This is the conspiracy alleged by the plaintiff States and later confirmed by the evidence

after discovery, but ignored by the courts below, which chose to analyze plaintiffs' allegations as charging a wholesale conspiracy.

Immediately after this court's decision in Illinois Brick Co. v. Illinois, supra, 431 U.S. 720, defendants began to argue that their distribution system fit within the rule of that case. Specifically, they argued that any purchases made by retail purchasers from dealers were indirect within the meaning of Illinois Brick, so as to immunize defendants from liability for any price-fixing activity. Agreeing with defendants, the district court ruled on August 26, 1980, (1) that plaintiff States could not recover for purchases they made from dealers who were not shown to be co-conspirators or to be controlled by a defendant, (2) that plaintiffs could not claim dealers were co-conspirators in a vertical price-fix without naming them as defendants, and (3) that plaintiffs' umbrella claims[2/] were barred by the rationale of Illinois Brick. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D. Cal. 1980) 497 F.Supp. 218. Subsequently, on September 30, 1981, the district court denied the States' motions

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2/ State of Washington v. American Pipe and Construction Co., et al. (W.D. Wash. 1968) 280 F.Supp. 802; In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation (W.D. Wash. 1981) 530 F.Supp. 36.

for certification of their classes of retail purchasers, solely on the ground that Illinois Brick barred recovery on most of the consumers' purchases and that, in any attempt by the States to prove a control exception of Illinois Brick, individual issues would predominate. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D. Cal. 1980) 523 F.Supp. 1116.

After the district court certified these decisions for appeal pursuant to 28 U.S.C. section 1292(b), the Court of Appeals for the Ninth Circuit accepted appeals of the two orders and consolidated them for hearing and decision. The Court of Appeals affirmed both orders. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d 1335. While the court expressly declined to decide whether Illinois Brick applies to plaintiff States' claims (In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d at 1338, fn. 1), it held, assuming Illinois Brick does apply: (1) that plaintiffs' umbrella claims are barred by the rationale of Illinois Brick, id. at 1338-1341, (2) that plaintiffs must name as parties any dealers with whom they charged defendants had a resale price maintenance conspiracy, id. 1341-1344) and (3) that proof of an Illinois Brick control exception

necessarily requires proof of individual questions sufficient to defeat class treatment. Id. at 1342-1343. (Although the court ruled that control could not be proved on a class-wide basis, it in fact did not decide what constitutes Illinois Brick control in general or in these actions. Ibid.)

REASONS FOR ALLOWANCE OF THE WRIT

A. INTRODUCTION

These actions were brought by the Attorneys General of five states to enforce the antitrust laws on behalf of these States,their citizens, and local governments, the victims of a massive horizontal price-fixing scheme undertaken by an economically powerful industry. The courts below ruled that this court's decision in Illinois Brick rendered them powerless to vindicate the rights of these victims. Because these rulings apply Illinois Brick in a novel fashion to undermine the policies of the antitrust laws and to immunize defendants and future price-fixers from any liability whatsoever, precisely contrary to the expressed purposes and goals of the Illinois Brick decision, plaintiffs respectfully petition this court to overturn the rulings below.

B. THE COURTS BELOW EXTENDED ILLINOIS BRICK TO DEFEAT THE ANTITRUST POLICIES ADVANCED BY THIS COURT

1. The facts in the present action are dispositively different from those in Illinois Brick.

Plaintiffs have alleged, and have now shown through discovery, that defendants horizontally agreed to raise and stabilize the retail price of gasoline purchased by millions of consumers throughout the United States.[3/] The courts below, however, interpreted this Court's decision in Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, to require that these injured consumers be denied compensation and that defendants forever be immune from liability for almost all of the injury their conspiracy caused. (A small portion of defendants' sales was direct to consumers through company-operated stations and hence not within the Court's Illinois Brick rulings.)

The Illinois Brick decision established a new rule of antitrust liability that was designed, in the Court's words, to further "the longstanding policy of encouraging vigorous private enforcement

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3/ Discovery in these cases has proceeded during the pendency of these interlocutory appeals. If certiorari is granted, plaintiffs will move to supplement the record to include a summary of the evidence developed subsequent to the filing of these appeals in the Ninth Circuit.

of the antitrust laws, see, e.g. Perma Life Muffers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed. 2d 932 (1968) . . . " supra, 431 U.S. at 745. The decision held that, if manufacturers fix the wholesale price of goods they sell in a wholesale market to middlemen, the manufacturers are not liable under Clayton Act section 4 (15 U.S.C. § 15) to the middlemen's customers for any damages passed on by the middlemen into the resale market. The fundamental question raised by this petition is whether this rule can be extended to an entirely different fact situation to immunize from liability manufacturers who conspire horizontally to fix prices at the retail level.

As this Court has recently recognized, the question of whether Clayton Act section 4 allows plaintiffs to recover cannot be answered in a vacuum. Instead, "the question requires us to evaluate the plaintiffs' harm, the alleged wrongdoing by defendants, and the relationship between them." Associated General Contractors of California, Inc. v. California State Council of Carpenters (1983) __ U.S. ___, 103 S.Ct. 897, 907 (footnote omitted). Instead of performing this required analysis, the district court held that, regardless of plaintiffs' harm, regardless of defendants' wrongdoing, and regardless of the relationship between them, Illinois Brick precludes recovery.

Plaintiffs have alleged, and the evidence shows, that defendant oil companies fixed the retail prices at which their gasoline was sold. Unlike the Illinois Brick defendants, the oil company defendants here have necessarily fixed the retail prices and not the wholesale prices, because in major branded gasoline marketing, unlike in Illinois Brick, there is no wholesale market in which to fix prices. Defendants' dealers are captive—they can only buy their gasoline from the defendant whose trademarked station they tend. Defendants did not compete for wholesale sales to dealers and did not fix dealer wholesale prices—they had no reason to do so. Hence, although in form defendants mostly sold indirectly to retail consumers, in reality they horizontally agreed on the retail price level because the retail market was the only place they competed.

2. The present case represents an unwarranted extension of Illinois Brick.

The fact situation described above must be measured against the intended goals of Illinois Brick. The Illinois Brick decision was designed to advance three important interdependent antitrust policies:

(1) prevention of duplicative recovery under Clayton Act section 4 in the absence of a "passing-on" defense, supra, 431 U.S. at 730-731, (2) avoidance of complicated proof of "passed-on" overcharges, id. at 731-732, and (3) vigorous enforcement of the antitrust laws, id. at 733-735. The new extension of Illinois Brick endorsed by the courts below frustrates rather than furthers these policies.

a. Plaintiffs' claims raise no threat of double recovery.

The Illinois Brick decision was designed to avoid the threat of double recovery inherent in Clayton Act section 4 if both the middleman and secondary purchaser can sue for the same overcharge. But no such threat is present here. If, as plaintiffs allege and as the facts show, defendants agreed to raise and stabilize the retail price of gasoline, the dealers have nothing to sue for since they did not buy the gasoline at retail, they sold it, and since they charged rather than paid the elevated retail prices.

As this Court recently recognized, to be entitled to recovery a plaintiff ordinarily should be "a consumer [or] a competitor in the market in which trade was restrained." Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 909. Defendants' dealers are obviously not consumers in

the retail gasoline market; nor can they claim as "competitors" in the retail market that overcharges to retail consumers damaged them in any way. Thus, under the standard of Associated General Contractors, dealers cannot recover for these retail overcharges, and the only parties who can be allowed to recover are the injured retail consumers who paid the higher prices.

The problem here is entirely different from the oft-noted possibility that, under Illinois Brick and Hanover Shoe Inc. v. United Shoe Machinery Corp. (1968) 392 U.S. 481 [88 S.Ct. 1231, 30 L.Ed. 2d 1231], a middleman can sometimes realize a windfall recovery if he manages to pass overcharges on to his customers. Here, the oil companies' horizontal conspiracy raised the prices that their captive middlemen dealers charged, not the prices they paid, so there is no sensible ground on which the dealers can sue to recover the overcharges.

b. Plaintiffs' claims raise no complicated issues of pass-on.

In Illinois Brick, the indirect purchaser was not allowed to sue because it was too complicated to estimate the amount of damage passed-on to him through the intermediate (contractor) market. In this case, there is no intermediate market and therefore no pass-on—defendants fixed the retail price that the consumers paid and should be liable for elevating the

retail prices on which they agreed. Damages would be measured by the elevation of the retail price, not by the amount of wholesale price elvation passed on.

Indeed, as the prior subsection demonstrates, the only theory under which dealers could recover would be that the retail price-fix was somehow "passed back" to them by defendants in setting the dealer tankwagon price to reflect the agreed-upon retail prices. The evidence shows that defendants tried to establish dealer tankwagon prices which would give dealers appropriate margins in light of the fixed retail price levels. But this "pass-back" theory would suffer from the complexities, uncertainties, and related infirmities of the "pass-on" theory in the Illinois Brick situation and hence could not prevail.

In fact, it is difficult to imagine antitrust rulings better designed to complicate and thereby discourage enforcement than those below. These decisions require plaintiffs to name as parties defendant every retail gasoline dealer in five states and to prove on a dealer-by-dealer basis the issue of market control, an issue which can be readily demonstrated on a market-wide basis. Phillips v. Crown Central Petroleum Corp. (4th Cir. 1979) 602 F.2d 616, 626; Federal Rules of Evidence, Rules 703-705; Manual for Complex Litigation section 2.71. Thus, the decisions below are fraught with the complexity Illinois Brick was designed to avoid.

c. The decisions below defeat Illinois Brick enforcement objectives by immunizing defendants from suit.

The central goal of Illinois Brick was to strengthen antitrust enforcement by reposing the full right of recovery in the direct purchaser.4/ As subsections a. and b. above demonstrate, there is no way consistent with Illinois Brick and Associated General Contractors for dealers to bring the action which the States have brought. Thus, if plaintiffs and their classes cannot recover, defendants are completely immune from suit.

Defendants glibly deny that they have escaped liability for their conspiracy by pointing to Bogosian v. Gulf Oil Corp. (3d Cir. 1977) 561 F.2d 434, cert. den. (1978) 434 U.S. 1086, as an example of the type of action dealers can bring. Unfortunately, the courts below accepted this fiction uncritically. Bogosian has nothing to do with the retail price-fix alleged by plaintiffs here; it concerns rather fanciful

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4/ While this was the court's expressed intention in Illinois Brick, empirical study indicates that this goal has not been achieved, even when (unlike in the present cases) the direct purchaser can sue. Sarris, The Efficiency at Private Antitrust Enforcement: The Illinois Brick Decision and Its Implications (1979 University Microfilms International) No. 7926844, pp. 193-213.

allegations of consciously parallel interdependent conduct resulting in tying arrangements between major oil companies and their branded dealers designed to eliminate the dealers from a wholesale market for gasoline. Id. at 447-448. See, id. at 458-460 (Aldisert, J. dissenting).

No one denies that dealers can and do file antitrust suits against oil companies; plaintiffs do submit that there is no rational theory under which dealers would be allowed to duplicate the present action. Bogosian does nothing to call this assertion into question. Bogosian concerns an entirely different theory of recovery, involving completely distinguishable injury to a different set of plaintiffs. Hence, the pendency of Bogosian does not raise the specter for defendants of double liability on the same cause of action. Between plaintiffs here and plaintiffs in Bogosian, only one might be correctly characterizing defendants' actions, but each has an equal right to prove its allegations, and defendants have no right to use the allegations of one set of plaintiffs to defeat the allegations of another set of plaintiffs.

3. The lower courts erroneously assumed that the present case falls within the rule of Illinois Brick.

The courts below focused on the fact that defendants exacted from their dealers a so-called "dealer tankwagon price" for the gasoline the dealers sold, and, contrary to plaintiffs' allegations and to the facts, treated the conspiracy as a horizontal one to fix tankwagon prices coupled with a vertical one to fix retail prices.5/ In reality, this dealer tankwagon price is nothing more than a reflection of the retail price defendants horizontally agreed to impose on the marketplace.

Proceeding under the erroneous presumption that defendants colluded on tankwagon rather than retail prices, the courts below equated the tankwagon price to the wholesale price which was actionable under Illinois Brick. However, a realistic appraisal of the fact situation presented here reveals the obvious: a captive marketer who can sell only his franchisor's product is not an independent intervening market within the meaning of Illinois Brick, and a tankwagon price which is merely set to reflect a horizontally fixed retail price is an inadequate

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5/ This failure to accept plaintiffs' allegations was in itself error. Associated General Contractors California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 902.

foundation on which to rest the entire burden of antitrust enforcement under Illinois Brick.

The Fourth Circuit, in analyzing a horizontal retail price-fix by independent oil companies who sold through dealers, perceptively noted that in the retail petroleum industry the horizontal/vertical distinction advanced by defendants there and adopted below in this case is an empty fabrication:

> "[T]he division of a price-fixing scheme such as that found here into 'horizontal' and 'vertical' components is, in some measure, an abstraction. The horizontal agreement would have been worthless if Crown had not the power to control the retail prices charged by its dealers. The point of the horizontal conspiracy was to stabilize the retail price market, and an agreement with competitors to hold retail prices steady would not work without control over those prices. The existence and duration of the horizontal conspiracy, then, is itself some measure of proof that Crown was able to control the retail prices its dealers charged." Phillips v. Crown Central Petroleum Corp., supra, 602 F.2d 616, 626 (footnote omitted, emphasis in original).

The decisions below are thus little more than examples of convenient but erroneous labeling. By calling sales to dealers a "wholesale market," by calling the dealer tankwagon price a "wholesale

price," and by calling a franchisor's captive dealers "direct purchasers" and consumers "indirect purchasers," one can of course rewrite the facts of this case into a rough image of Illinois Brick. To do so, however, disposes of the present case readily but flouts the enforcement objectives repeatedly espoused by this court in Illinois Brick and elsewhere.6/ This Court has cautioned, in light of the Clayton Act section 4's expansive remedial purpose, that courts must not take this technical, semantic approach in determining who is entitled to sue. Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 313.

Illinois Brick was founded on two interlocking premises. One was that the direct purchaser would always be able to sue the price-fixer, so that there would be no hiatus in antitrust enforcement. The second was that the existence of two levels of injured parties raised a threat of double recovery not contemplated by Congress in enacting Clayton Act section 4. Neither of the premises applies here, where the defendants competed in the retail but not in the (non-existent)

6/ Supra, 431 U.S. at 720-721; American Society of Mechanical Engineers v. Hydrolevel Corp. (1982) 456 U.S. 556, 570; Blue Shield of Virginia v. McCready (1982) __ U.S. __, 102 S.Ct. 2540, 2545.

wholesale market for sales to dealers, where defendants horizontally fixed retail prices, but where the courts below, by uncritically applying Illinois Brick, have precluded retail consumers from redressing retail injuries. Since the intermediary dealers cannot bring an action to recover overcharges they themselves charged their customers, the threat is quite real here, unlike in Associated General Contractors, that "[d]enying [plaintiffs] a remedy on the basis of [their] allegations in this case is . . . likely to leave a significant antitrust violation undetected or unremedied." Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 911.

C. THE ERRORS OF THE COURTS BELOW REQUIRE EXERCISE OF THE COURT'S CERTIORARI JURISDICTION

The importance of the questions raised by this petition, both for the present case and for the future course of antitrust enforcement, cannot be overstated. In the present action alone, millions of retail consumers have been barred from recovering damages for horizontal retail price-fixing. During the single year 1971, over 17 billion gallons of gasoline were consumed in highway usage in plaintiff States. Federal Highway Administration, Highway Statistics, 1971, 1972, and 1973 editions.

Assuming that about 90% of these sales were retail sales (Federal Energy Administration, Petroleum Market Shares (1975), p. 19), these actions involve price-fixing in the sale of over 15 billion gallons of gasoline a year.

Moreover, if defendants here are successful in converting Illinois Brick from a pro-enforcement rule of recovery into a blanket immunity from liability, the lesson will not be lost on the economy as a whole. Every industry with sufficient market power will be motivated to follow defendants' model and insert captive middlemen between itself and the victims of horizontal price-fixing. Sherman Act section 1 would thereby be effectively repealed for some of the nation's most economically powerful industries.

This result, plaintiffs submit, is an unacceptable blow to our economic system of unrestrained competition. Illinois Brick must not be blindly extended to a fact situation where its rationale does not apply. As this Court has recognized before in reconsidering its antitrust rulings, "Realities must dominate the judgment . . . . The Anti-Trust Act aims at substance." Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36, 47, citing Appalachian Coals, Inc. v. United States (1933) 288 U.S. 344, 360. If, as this Court has recently reaffirmed, "[a] principal purpose of the antitrust

private cause of action . . . is . . . to deter anticompetitive practices," American Society of Mechanical Engineers v. Hydrolevel Corp., supra, 456 U.S. at 572, and if "the antitrust private action was created primarily as a remedy for the victims of antitrust violations," id. at 1947, then this court must exercise its responsibility as the final interpreter of the antitrust laws to allow recovery by the intended victims of one of the most far-reaching horizontal conspiracies in the history of the United States economy.

Accordingly, this case raises "an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rules, Rule 17, so that certiorari should be granted. Certiorari is appropriate where rulings below "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States. . . ." Perma Life Mufflers, Inc. v. International Parts Corp., supra, 392 U.S. 134, 136, and where the case presents important issues under the antitrust laws. Albrecht v. Herald Co. (1968) 390 U.S. 145, 146; National Broiler Marketing Assn. v. U.S. (1978) 436 U.S. 816, 818.

The need for Supreme Court review is particularly acute where, as here, earlier Supreme Court decisions have left important issues unresolved and in need of clarification by earlier Supreme Court decisions. Securities and Exchange Commission v.

United Benefit Life Insurance Co. (1967) 387 U.S. 202, 207; Federal Trade Commission v. Travelers Health Association (1960) 362 U.S. 293, 297. This court will not hesitate to explain, modify, or even overturn its earlier antitrust decisions where "the need for clarification of the law in this area justifies reconsideration." Continental T.V., Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 47. Specifically, this court has not specified whether Illinois Brick can be extended to bar retail consumers' claims for a retail price fix; assuming such an extension is permissible the district court defeated Illinois Brick's underlying policies.

Even beyond the vital importance of the questions presented to future enforcement of the antitrust laws, the present action is itself so important that Supreme Court review is required. The rights of most adult citizens in five states to recover for injuries resulting from an unabashed horizonal retail price-fixing scheme will stand or fall on the resolution of the questions presented; the outcome will determine whether an entire industry can profit from horizontal price-fixing. When the substantial rights of so many people, involving such significant amounts of damage, are at issue, certiorari should be granted. Commissioner of Internal Revenue v. Standard Life & Accident Insurance Co. (1977) 433 U.S. 148, 151 ("substantially more than $100 million is in dispute"); United States

v. Zazove (1948) 334 U.S. 602, 605, 613-614 fn. 17 ("the added potential liability . . . might well amount to billions of dollars"); Patterson v. Lamb (1947) 329 U.S. 539, 541 ("will hereafter affect, the status and claims of thousands of draftees. . . .").

Plaintiffs do not assert a conflict among the Courts of Appeals. Given the interlocutory nature of the issues on appeal, it is not surprising that they have reached only one Court of Appeals. However, there is a conflict below which merits resolution by this court.

The one other reported decision on point, from the Southern District of New York in the Second Circuit, is in direct conflict with the decisions below. Soskel v. Texaco, Inc. (S.D.N.Y. 1981) 514 F.Supp. 578. In Soskel, the court rebuffed an attempt by defendant Texaco (a defendant in the present action) to apply Illinois Brick to a petroleum price control claim on the ground that the dealer stood between plaintiff and defendant. The ruling there was 180 degrees opposite the decisions in this case:

> "[T]he rationale of the Illinois Brick doctrine does not apply here. That doctrine applies where there has first occurred a transaction between an indirect seller and a direct seller which involves, say, price-fixing, and subsequently another transaction between the direct seller and the plaintiff purchaser which passes along the consequences of the first

price-fixing. In such a case, the courts have confined the cause of action against the initial (indirect) seller to the party which purchased from that seller (with some exceptions), thus avoiding intractable computational problems.

"However, the plaintiffs in the case at hand appear not to allege a pricing violation in a prior transaction to which they were not a party, the consequences of which were then passed on to them. Rather, they allege that the pricing violation took place in the sale of gas to them, and that Texaco participated in and was otherwise responsible for the violation which took place in that transaction. Accordingly, the Illinois Brick rationale does not apply." 514 F.Supp. at 580.

Given the unlikelihood of these interlocutory questions reaching another Court of Appeals in the forseeable future, if ever,7/ and the urgency of the questions presented, it is appropriate for this Court to grant certiorari to resolve the conflict between the Ninth Circuit and the Southern District of New York. Massachusetts v. United States (1978) 435 U.S. 444, 453.

7/ Soskel has not gone to judgment and appears to be near settlement. Soskel v. Texaco, Inc. (S.D.N.Y. 1982) 94 F.R.D. 201.

D. SUMMARY

The district court summarized the impact of its ruling as follows:

> "This court is aware of the likelihood that its refusal to certify the proposed class means that there is no practical way in which damages may be recovered for most individual gasoline purchasers, no matter how much the constantly increasing prices that they have paid may have stemmed from antitrust conduct on the part of the wholesale suppliers. However, this is the mandate of the Supreme Court in Illinois Brick." Supra, 523 F.Supp. at 1121.

Plaintiffs have brought this petition because they believe this regrettable result was not the intended mandate of this court where there is no threat of duplicative recovery, where there is no other purchaser with even the theoretical power to bring suit and enforce the antitrust laws, where the consumers directly paid horizontally fixed prices (not passed-on overcharges), and where the litigation has been made markedly more complex by the lower courts' Illinois Brick interpretations. To the contrary, as this Court recently recognized, "[t]he legislative history of [Clayton Act section 4] shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets."

Associated General Contractors of California v. California State Council of Carpenters, supra, 103 S.Ct. at 904.

Plaintiffs submit that Illinois Brick has left open too many unanswered questions affecting substantial rights of too many persons for this Court not to step in and resolve the controversy. If Clayton Act section 4 is to serve its dual purposes of deterring violators and of compensating victims, Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 314, Illinois Brick must not be transformed by wooden application into a doctrine that immunizes even the most blatant antitrust offenses. Only this Court can provide the needed clarification of Illinois Brick to square the decision again with Clayton Act section 4's "broad remedial and deterrent objectives." Blue Shield of Virginia v. McCready, supra, 102 S.Ct. at 2545.

Respectfully submitted this 27th day of May 1983.

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APPENDIX A

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRÓDUCTS ANTITRUST LITIGATION

STATE of California, et al., Plaintiffs-Appellants,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al., Defendants-Appellees.

Nos. 81-5117, 81-5930.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 4, 1982.

Decided Nov. 9, 1982.

Before ANDERSON, SKOPIL and CANBY, Circuit Judges.

CANBY, Circuit Judge:

These interlocutory appeals are before us under 28 U.S.C. § 1292(b). They arise from a group of antitrust actions brought against sixteen oil companies by the states of Arizona, California, Florida, Oregon, and Washington. The complaints, which are similar in all material respects, allege violations of the Sherman Act, 15 U.S.C. §§ 1 & 2. The portions of the complaints material to these

appeals allege that the defendant oil companies combined and conspired to raise or stabilize the prices of refined petroleum products.

The cases were filed at various times between July 1973 and February 1977. In August 1976, the Judicial Panel on Multidistrict Litigation transferred the then-pending cases to the Central District of California for coordinated pretrial proceedings. *In re Petroleum Products Antitrust Litigation*, 419 F.Supp. 712 (Jud.Pan.Mult.Lit.1976). Subsequent cases were filed directly in the Central District.

The plaintiff States sue in their proprietary capacity and on behalf of their citizens as *parens patriae* pursuant to section 4C of the Clayton Act, 15 U.S.C. § 15c. They also seek to represent classes of government entities and a consumer sub-class consisting of natural persons who purchased defendants' products prior to the September 30, 1976 effective date of the states' *parens patriae* authority.

The primary goal of plaintiffs in this action is the recovery of antitrust damages for allegedly inflated retail gasoline prices paid by the plaintiffs and the classes they seek to represent. The principal difficulty plaintiffs have faced is the Supreme Court's intervening announcement in *Illinois Brick*

v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), that indirect purchasers of price-fixed goods may not maintain an antitrust damage action for overcharges passed on to them by direct purchasers from the defendant. According to the plaintiff States, an estimated 80 percent of the retail gasoline transactions at issue here involve indirect purchases from non-defendant retail dealers.

Shortly after the decision in *Illinois Brick*, the defendant oil companies moved to dismiss portions of the plaintiff States' complaints on various grounds, among them that plaintiffs are indirect purchasers barred by *Illinois Brick* from recovering damages. On August 26, 1980, the district court issued an order on the applicability of *Illinois Brick* to the instant proceedings. Portions of this order are the subject of the first interlocutory appeal.

The second interlocutory appeal is from a subsequent order of the district court denying plaintiffs' motion for certification of the consumer sub-class. The district court made the required certification of the two appeals and the plaintiffs filed timely petitions for permission to appeal. This court granted both interlocutory appeals and the cases were calendared together for oral ar-

gument. We now affirm the district court's orders in both cases.

I.

The first appeal is from the district court's certification to us of paragraphs "third" and "fourth" of its August 26, 1980 order.[1] At paragraph "third," the district court ruled: "[A]ll claims for damages based on purchases from firms that competed with the defendants but did not conspire

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1. We note at the outset what is not before us. At paragraph "second" of the district court's order, the court ruled that plaintiffs may seek damages from the defendants "only as to direct purchases from the defendants, their co-conspirators, sellers with whom plaintiff had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the defendants or their co-conspirators." The "cost-plus" and "control" situations referred to by the district court in its ruling are possible exceptions to the bar against indirect purchaser claims. *Illinois Brick*, 431 U.S. at 736 and n. 16, 97 S.Ct. at 2069 and n. 16. Although much of the appellate briefing in this case is concerned with the correctness of the district court's ruling in paragraph "second," the district court did not certify this paragraph to us. We trust we will not surprise counsel by expressing no opinion on the issues raised by this ruling.

with them to violate the antitrust laws are dismissed." Paragraph "fourth" states: "[T]he plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the conspiring retail dealers are joined as parties defendant." For the reasons set forth below, we affirm these rulings.

Paragraph "Third"

Paragraph "third" dismissed plaintiffs' claims for damages sought under an "umbrella" theory of liability.[2] Plaintiffs contend that defendants' successful price-fixing conspiracy created a "price umbrella" under which non-conspiring competitors of the defendants raised their gasoline prices to an artificial level at or near the fixed

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2. Plaintiffs claim standing to assert an umbrella claim under § 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

price. Since defendants are allegedly responsible for creating a market situation where conduct of this nature is possible, plaintiffs argue that defendants should be held responsible for damages resulting from their competitors' higher prices.

The umbrella theory is essentially a consequential damages theory. It seeks to hold price-fixers liable for harm allegedly flowing from the illegal conduct even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions. Since the decision in *Illinois Brick*, at least one district court has allowed plaintiffs to proceed under an umbrella theory. *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 530 F.Supp. 36 (W.D.Wash.1981). The Third Circuit, however, has expressly rejected its use. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979).

Although the Court in *Illinois Brick* was not faced with an umbrella claim, the rationale for its decision barring indirect purchasers from seeking antitrust damages must be considered in determining the viability of an umbrella theory of liability. In *Illinois Brick*, plaintiffs attempted to recover damages from defendants who allegedly had overcharged the sellers from whom the plaintiffs purchased. The plaintiffs claimed

that their immediate sellers passed on the overcharges to them. In rejecting the offensive use of a pass-on-theory,[3] the Court noted the possibility of duplicative recovery if both direct and indirect purchasers could claim damages resulting from a single overcharge by an antitrust defendant. 431 U.S. at 730–31, 97 S.Ct. at 2066–67. The Court reasoned that, by concentrating the recovery in direct purchasers rather than among a broad class of potentially affected plaintiffs, the antitrust laws would be enforced

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3. The Court had previously held that in a suit by a direct purchaser, an antitrust violator may not defend on the ground that the direct purchaser has not been injured because it had passed on the illegal overcharge to its own customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Illinois Brick*, the Court expressed a desire to maintain symmetry with its previous decision.

more effectively.[4] The Court further noted the tremendous burden that would be placed on antitrust proceedings by the "massive evidence and complicated theories" necessary to measure and trace the effect of an overcharge through each step of the distribution chain, *id.* at 737, 97 S.Ct. at 2070, and the attendant complexities inherent in apportioning damages "among all potential plaintiffs that could have absorbed part of the overcharge." *Id.* at 741, 97 S.Ct. at 2072.

In *Mid-West Paper, supra*, the Third Circuit found the umbrella claim before it analogous to the pass-on issue involved in *Illinois Brick* because "in both situations the plaintiff seeks to recover for higher prices set by, and paid by it to, parties other than the defendants." 593 F.2d at 584. Given the fact that numerous factors influence a firm's pricing decisions, the court concluded that an umbrella claim is necessarily conjectural and speculative in nature. *Id.* at 584–

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4. In *Blue Shield v. McCready*, — U.S. ——, ——, 102 S.Ct. 2540, 2546, 73 L.Ed.2d 149 (1982), the Court reiterated that in *Illinois Brick* it had concluded that "direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote." (citation omitted).

85. Moreover, ascertaining how and why a competitor of the defendant charged a certain price would mire the court in a complex economic proceeding of the type *Illinois Brick* sought to prevent. *Id.* at 585. The spectre of complicated, speculative proceedings combined with the potential for ruinous recoveries, well in excess of defendants' illegally earned profits, *id.* at 586, led the court to hold that purchasers from competitors of price-fixing defendants may not seek damages under an umbrella theory of liability.

The decision in *Mid-West Paper* is not without its critics. *See id.* at 595–99 (Higginbotham, J., dissenting in part); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166 n. 24 (5th Cir. 1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980); 93 Harv.L.Rev. 598 (1980). First, since the umbrella claimant in *Mid-West Paper* was a direct purchaser from a competitor of the defendants, there was no danger of duplicative recovery, a major concern of the court in *Illinois Brick*. Second, *Mid-West Paper* involved only one class of plaintiffs and a single level of distribution. Therefore, the concern in *Illinois Brick* over the complexities involved in tracing the effects of a conspiracy through several levels of manufacture and distribu-

tion was not present. Third, proof of what the non-conspiring competitor may have charged absent the conspiracy need not involve evidence more complicated than that adduced in other antitrust proceedings. Fourth, the Court in *Illinois Brick* was concerned with prohibiting economically complex evidence only where it would threaten the effective enforcement of the antitrust laws by reducing the incentive of direct purchasers to sue. Allowing an umbrella claimant to sue for his injuries in no way reduces the incentive to sue of direct purchasers from the defendants. Fifth, although the possibility of ruinous recovery is not unimportant, this concern is more properly addressed to Congress. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979).

[1] The viability of an umbrella claim in the wake of *Illinois Brick* is an important issue of first impression in this circuit.[5] We need not decide, however, whether, in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defend-

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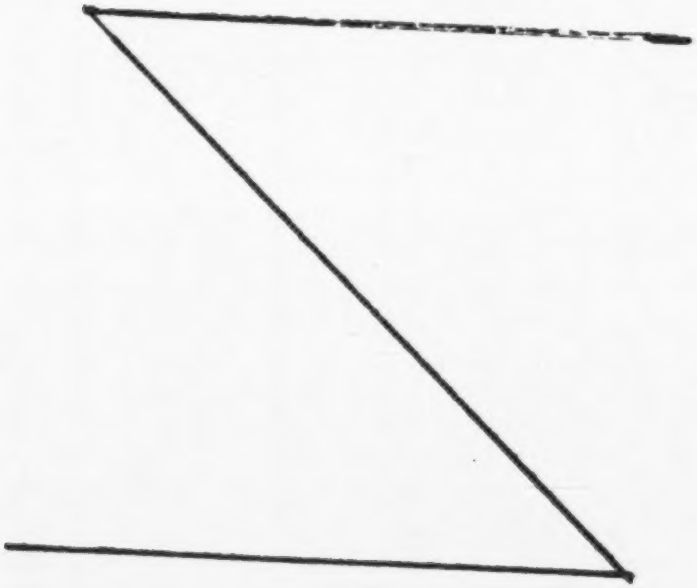
5. Prior to *Illinois Brick*, one court in this circuit allowed an umbrella claim. *Washington v. American Pipe & Construction Co.*, 280 F.Supp. 802 (W.D.Wash.1968).

ants can assert claims for damages against price-fixing defendants under an umbrella theory. In the case before us, the umbrella claimants purchased gasoline from independent marketers who, in turn, purchased their gasoline from independent refiners. These independent refiners manufactured a percentage of the independent marketers' supply and brokered the remainder of the marketers' supply from major refiners, *i.e.*, the defendants.

For two reasons, we have little hesitancy in concluding that the limitations recognized in *Illinois Brick* bar umbrella claims in the context of the multi-tiered distribu-



tion chain alleged here.[6] First, to the extent that plaintiffs seek recovery for overcharges for gasoline originally purchased from defendants by independent refiners, the overcharge to plaintiffs may simply result from a pass-on of the original unlawfully inflated price. If so, it falls squarely within *Illinois Brick*. Even if plaintiffs were somehow able to prove that there was no pass-on, and that the inflated prices in the non-conspirators' distribution chain

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6. In *Blue Shield v. McCready*, — U.S. ——, ——, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982), the Court noted that two analytically distinct types of limitations have been imposed on the § 4 remedy: 1) those arising out of *Illinois Brick* and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), involving considerations of duplicative recovery and unwarranted evidentiary complexities engendered by speculative damage claims and 2) those arising out of claims that a particular injury is too remote from the alleged violation to accord a plaintiff standing under § 4. Because we decide this case on the basis of *Illinois Brick*, we need not decide whether plaintiffs meet the test of standing traditionally employed by this Circuit to determine remoteness under § 4. *See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973). *Cf. Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (collecting cases and suggesting a balancing analysis).

were the independent result of an umbrella effect, the danger of double recovery condemned by *Illinois Brick* would remain. The independent refiners would still have an enforceable claim for damages against the defendants for the entire unlawful overcharge to them, without reduction for damages suffered by plaintiffs. The result, if plaintiffs were to succeed here, would be liability of the defendants twice for the effects of the same overcharge.

The second reason that plaintiffs' claims are barred by *Illinois Brick*, wholly apart from the problems of pass-on and double recovery, is that they are unacceptably speculative and complex. Thus, any umbrella claims plaintiffs may assert for damages based on those purchases of gasoline not acquired originally from the defendants also must fail. A major theme in *Illinois Brick* is that the "feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4." *Blue Shield v. McCready*, — U.S. ——, —— n. 11, 102 S.Ct. 2540, 2546 n. 11, 73 L.Ed.2d 149 (1982). Although we recognize that the "difficulty of ascertainment [should not be] confused with a right of recovery," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66

S.Ct. 574, 580, 90 L.Ed. 652 (1946), we nevertheless must consider whether "a claim rests at bottom on some abstract conception or speculative measure of harm." *McCready, supra.*

[2, 3] Under an umbrella theory, the result of any attempt to ascertain with reasonable probability[7] whether the non-conspirators' prices resulted from the defendants' purported price-fixing conspiracy or from numerous other pricing considerations would be speculative to some degree.[8] When the fact of a multi-tiered distribution

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7. To recover treble damages, plaintiffs must prove actual causation—"injury in fact." *Flintkote v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). Although the trier of fact may reasonably estimate the amount of damages, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264–65, 66 S.Ct. 574, 579–80, 90 L.Ed. 652 (1946), a higher quantum of proof is required to establish "injury in fact." *Flintkote supra; see Story Parchment Co. v. Paterson*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). Plaintiff is required to establish with "reasonable probability" the existence of the latter. *Flintkote, supra.*

8. In *Midwest Paper*, 596 F.2d at 584, the court listed complex pricing variables that exist when only one level of distribution is involved, including cost of production, marketing strategy, elasticity of demand, and price of comparable items.

system is imposed upon the above complex set of variables, the obstacles to intelligent inquiry become nearly insurmountable. The causal effect of each pricing decision would have to be pursued through the chain of distribution. Not only would we be required to speculate that plaintiffs were injured solely as the result of umbrella pricing, but also we would be required to sanction complex judicial inquiry into the pricing decisions of sellers remote from plaintiffs. We decline to do either, and accordingly hold that under the facts of this case, application of an umbrella theory is unwarranted.

Paragraph "Fourth"

[4] In an effort to circumvent *Illinois Brick*, plaintiffs suggested to the district court that they might seek to prove a resale price maintenance conspiracy between defendants and retail dealers. At paragraph "fourth," the district court ruled that plaintiffs must join retail dealers as defendants if they pursue a conspiracy claim.

Without benefit of specific factual allegations that the future amended complaint may contain, we express no opinion on whether a vertical conspiracy claim may be

appropriate in this case.[9] Assuming such a claim may be stated, however, we find no error in the district court's ruling.

Absent joinder of retail dealers, serious risks of duplicative recovery and inconsistent adjudications would ensue. *In re Beef Industry Antitrust Litigation, supra,* 600 F.2d at 1148. If plaintiffs recovered dam-

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9. Because plaintiffs have not amended their complaints to allege a vertical conspiracy, there is a question whether this issue should be held ripe for decision. *See Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039 (9th Cir. 1973). Because the district court has indicated its intent to allow an amendment subject to the disputed condition, and because there is little possibility of an intervening event rendering decision unnecessary, *cf. id.* (certified question might be rendered moot by jury verdict), we exercise our discretion to decide the joinder issue in the interest of judicial economy. In so doing, however, we expressly leave unresolved issues involving the viability of vertical conspiracy claims in situations arguably put to rest by *Illinois Brick*. Nor do we express an opinion on any alleged distinctions between the "control" exception alluded to in *Illinois Brick*, 431 U.S. at 736 n. 16, 97 S.Ct. at 2070 n. 16 and conspiracy claims based on vertical coercion, *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1356 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

ages for a vertical conspiracy between defendants and non-party retail dealers, any of those dealers could prove in a subsequent action that they were not conspirators and, as direct purchasers, were entitled to damages arising out of the same events. In *Illinois Brick*, the Court expressly found unacceptable the risk of duplicative recovery created by allowing direct and indirect purchasers to claim damages resulting from a single transaction that violated the antitrust laws. 431 U.S. at 730–31, 97 S.Ct. at 2066–67. *McCready*, —— U.S. at ——, 102 S.Ct. at 2546.

We also cannot accept plaintiffs' contention that no duplicative recovery can occur here because there is no intervening market between the defendants and their retail dealers. We note that fifteen defendants in this action are named as defendants in other litigation where a certified class of lessee retail dealers, who bought gasoline from defendants during the period covered by the complaints in this case, similarly allege that defendants, through exclusive supply arrangements with their dealers, have eliminated horizontal competition at the wholesale level. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

We further reject plaintiffs' argument that an exception to a rule requiring joinder should obtain where, as here, the statute of limitations has run on direct purchasers. We note that the claims in *Bogosian, supra*, overlap the claims at issue here. Moreover, the record indicates that plaintiffs intend to seek damages up to the time of trial for a continuing conspiracy. Under these circumstances, dealer claims against defendants covering the last four years would not be time-barred. Plaintiffs' suggestion, therefore, does not remove the risk of multiple liability. Furthermore, we are unwilling to countenance *ad hoc* case-by-case exceptions to a rule of intended general application. *See Illinois Brick*, 431 U.S. at 743–45, 97 S.Ct. at 2073–74.

We accordingly uphold the ruling of the district court that if a proper vertical conspiracy claim is alleged, joinder of retail dealers is required to prevent a serious risk of multiple liability.

II.

The second interlocutory appeal is from the district court's order denying plaintiffs' motion to certify classes of indirect purchaser retail consumers pursuant to Rule 23(b)(3), Fed.R.Civ.P.

[5, 6] A decision denying class certification is reviewable on appeal only for abuse of discretion or for application of impermissible legal criteria. *Pattillo v. Schlesinger*, 625 F.2d 262, 264 (9th Cir. 1980); *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir.1977). Although in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true, *Blackie v. Barrack*, 524 F.2d 891, 901 n. 7 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976), the court also is required to consider the nature and range of proof necessary to establish those allegations. *Id.* at 901.

The district court ruled that if plaintiffs seek to by-pass the rule in *Illinois Brick*, any theory on which they might rely would raise predominantly individual questions relating to the relationships between the defendants and each of their approximately 35,000 retail dealers. We agree.

The plaintiffs argue that the "control" exception to *Illinois Brick*, 431 U.S. at 736 n. 16, 97 S.Ct. at 2070 n. 16 [10], is susceptible

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10. At footnote 16, the Court in *Illinois Brick* implied that an exception to its rule barring indirect purchaser claims might exist "where the direct purchaser is owned or controlled by its customer."

of proof on a classwide basis without inquiry into the pricing decisions of the retail dealers. Plaintiffs propose to establish their claim by circumstantial evidence including lease and supply agreements between the defendants and their dealers, and marketwide price statistics. None of the leases or supply agreements at issue here, however, purport to allow the defendant oil companies to fix the retail dealers' prices to the public. Moreover, marketwide price statistics are insufficient evidence upon which to avoid *Illinois Brick*. A nationwide increase in gasoline prices may reflect nothing more than the fact that wholesale prices are important factors in retail pricing. Assuming *arguendo* that defendants engaged in a conspiracy to fix the wholesale price of gasoline, an across-the-board increase in gasoline prices may well indicate nothing more than the dealers' independent decisions to pass on wholesale overcharges to the consuming public.

Without giving the district court an opportunity to pass on the issue, we are unwilling at this stage of the proceedings to pronounce the precise contours of the "control" exception to *Illinois Brick* or to decide whether or not it may have application to the facts of the case. We do conclude, however, that if such an exception is applicable, the degree to which the individual

retail dealers may have exercised independent pricing discretion is important. Accordingly, individual questions involving the pricing decisions of 35,000 retail dealers will predominate and preclude class treatment.[11]

[7–9] To the extent that plaintiffs' proposed vertical conspiracy claim may differ from its allegations of the "control" exception to *Illinois Brick*, we reach a similar conclusion.[12] Vertical price fixing, of course, is *per se* illegal. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n. 18, 97 S.Ct. 2549, 2558 n. 18, 53 L.Ed.2d 568 (1977). Supplier actions that might influence resale prices but which do not sufficiently induce avoidance of price competition, however, do not constitute vertical price fixing. *General Cinema Corp. v. Buena Vista Distribution*, 681 F.2d 594 at 597 (9th Cir. 1982); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 806 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). To prevail on a vertical price fixing claim, plaintiffs must show

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11. Rule 23(b)(3), Fed.R.Civ.P. requires that common questions of law or fact predominate over any individual question.

12. In each instance, plaintiffs allege that defendants coerced their retail dealers into charging fixed prices.

"affirmative action" on the part of the oil companies which induced their dealers to charge certain prices. *General Cinema, supra.* They also must show that the dealers succumbed to such pressure. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355–57 & n. 8 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

[10, 11] Proof of a close conformity between wholesale and retail prices is insufficient to establish a vertical conspiracy claim on a class-wide basis. Absent common evidence of standard contracts that demonstrate control over the retail dealers' pricing decisions or some other readily demonstrable and equally convincing evidence, individual issues will predominate and render class treatment inappropriate. *See Chicken Delight, Inc. v. Harris*, 412 F.2d 830, 831 (9th Cir. 1969).[13]

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13. In *Chicken Delight* the trial court initially certified a class with respect to claims of illegal "tying." When the time came to send class notices, plaintiffs sought to include in their description of the case a pricing issue relating to defendant's alleged coercive, extracontractual control over its franchisees' retail prices. We found the latter issue inappropriate for class treatment because, unlike the tying claim, it could not be tried upon the common evidence of the standard franchise contracts. We issued a writ of mandamus to correct the error.

[12] Because plaintiffs have failed to suggest any acceptable method of demonstrating on a class basis that the individual retail dealers lacked pricing discretion, they have not met their burden of showing that the proposed classes satisfy the requirements of Rule 23, Fed.R.Civ.P. *In re Hotel Telephone Charges*, 500 F.2d 86, 88 (9th Cir. 1974).

AFFIRMED.

APPENDIX B

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION.

No. MDL-150-WPG.

United States District Court,
C. D. California.

Sept. 30, 1981.

MEMORANDUM OF DECISION AND ORDER

WILLIAM P. GRAY, District Judge.

[1] The plaintiffs in these consolidated antitrust actions against several major oil companies are the Attorneys General of the States of Arizona, California, Florida, Oregon and Washington. They have filed motions for the certification of a plaintiff subclass consisting of all natural persons * residing in their respective states who have purchased motor gasoline at retail within such states during the periods covered by the complaints. These motions have been extensively briefed and argued and submitted for decision. For reasons set forth in this memorandum, they are denied.

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* Arizona has a slight variation that is immaterial here.

It has been obvious ever since these cases were filed that the principal goal of the plaintiffs is to accomplish a recovery of antitrust damages on behalf of their citizens who have been obliged to pay allegedly inflated prices at the retail gasoline stations. However, in 1977 the Supreme Court rendered its decision in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, which held that an indirect purchaser from a person that violates the antitrust laws may not recover damages. Most of the automobile owners that use gasoline produced by the defendants make their purchases directly from retail dealers, and only indirectly from the defendants that supply such dealers. Thus, the *Illinois Brick* decision necessarily dealt a traumatic blow to the plaintiffs' plans.

Subsequently, following the lead of *Royal Printing, Inc. v. Kimberly-Clark Corporation*, 621 F.2d 323 (9th Cir. 1980), and *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3d Cir. 1978), I inferred an exception to the strict holding in *Illinois Brick* and announced the ruling that "... the plaintiffs will be allowed to recover from the defendants for overcharges passed on by entities owned or controlled by the defendants." *See In re Coordinated Pretrial Proceedings, etc.*, 497 F.Supp. 218 (C.D.Cal. 1980).

Thus, under the present posture of this litigation, even assuming that the plaintiffs will be able to prove a horizontal conspiracy by the defendants to fix retail gasoline prices, they must also establish that the dealers from whom the plaintiffs (or proposed class members) bought at inflated prices were owned by or under the control of the defendant suppliers.

Counsel and the court have expressed mutual awareness that it would be completely impracticable in this action to litigate the control relationships between the respective defendants and each of their many thousands of dealers in order to determine which of the millions of retail transactions could result in liability to the defendants. Under these circumstances, the question that has beset the plaintiffs is how they can hope to show, on a class action basis, that the defendants' control over all of their dealers was so pervasive that they could fix the retail prices of gasoline without any uncontrolled discretion being exercised by the gasoline station operators that made the sales. In other words, how could the participation of the retail dealer be disregarded in the setting of prices at which sales are made to the public.

I have had considerable sympathy for the plaintiffs as they faced the problem of *Illinois Brick*, and have given them somewhat extended opportunity to develop and assert just how they propose to surmount it. After several valiant written and oral attempts, the answer is clear, they simply cannot do it; *Illinois Brick* makes it impossible to proceed in these cases with the type of class that is here proposed.

The plaintiffs regularly have insisted that they can prove that the defendants, through horizontal conspiracy, established and controlled retail gasoline prices, that market forces thereby were superseded, and that dealer participation was insignificant. However, their explanations as to just how such control was exercised have been very general, somewhat vague, and occasionally inconsistent.

This court is mindful that the plaintiffs cannot be expected to prove their case at this stage of the proceedings. On the other hand, before certifying a class, I must be convinced that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met, including particularly the predominance of common questions of fact and law and that the litigation would be

manageable. In doing so, I am not entitled to rely "... on the 'imagination' of [the plaintiffs'] counsel to provide solutions that will, at some point in the future, prevent ... individual issues from splintering the action into thousands of individual trials requiring years to litigate." *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974). From all of the contentions, as best I can understand them, the conclusion appears unavoidable that either *Illinois Brick* precludes recovery of damages growing out of purchases from dealers, or that the relationships between the respective defendants and each of their individual dealers would have to be litigated. Neither of these alternatives would justify a class action of the nature here proposed.

[2] In urging that the participation of the retail dealers may be deemed inconsequential for class action purposes, the plaintiffs suggest, as one "string to their bow," that the defendants actively and vigilantly sought to persuade their dealers to adhere to the retail prices that the defendants recommended. However, for a wholesaler to *recommend* that its dealers charge a particular price is not a violation of laws against price fixing. To the extent that such efforts succeeded, they simply reflect the

amount of "pass on" of the alleged wholesale overcharge that *Illinois Brick* says we may not even consider.

The plaintiffs make much of the "dealer discounts" that the defendants, allegedly on a conspiratorially coordinated basis, granted to and withdrew from their respective dealers. But such activities directly operated only upon the *wholesale* prices. The "saw tooth" charts submitted by the plaintiffs show what appear to be general immediate increases in retail prices in apparent response to the withdrawal of dealer discounts. But such a showing, in itself, establishes only the obvious fact that wholesale prices are a very important factor in the fixing of retail prices. The charts, being averages, do not show, or even suggest, nondiscretionary, automatic, specific price increases by all dealers. Some of the dealers, probably most, may have raised their retail prices to pass on to their customers the full amount of the wholesale price increases occasioned by the withdrawal of dealer discounts. Others may have absorbed such increases in whole or in part. The defendants probably did make suggestions as to the retail prices and sought to persuade their dealers to follow them. The saw tooth charts suggest that these efforts met with considerable success. However, to

the extent that suggestion and persuasion were involved, discretion remained in the dealer, and *Illinois Brick* precludes the purchaser from looking beyond him to the defendant wholesaler.

[3] The plaintiffs also make the stronger contention that the defendants' influence upon their dealers in fixing retail prices went beyond recommendation or persuasion and amounted to coercion. Of course, for a wholesaler to use coercion to induce its dealers to accept its suggested retail prices constitutes a vertical conspiracy in violation of the Sherman Act. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 45, 80 S.Ct. 503, 512, 4 L.Ed.2d 505 (1960). *See also Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355 (9th Cir. 1976).

For several reasons, the present litigation cannot proceed as a class action to the extent that the plaintiffs may rely upon an ability to establish vertical conspiracies. In the first place, such issues necessarily involve individual questions as to how each of the many dealers reacted to the alleged coercive pressure. Some people are more susceptible to attempts at coercion than others. This very fact makes it impossible to conclude that dealer participation may be ignored. But the need to consider how the

thousands of dealers responded individually to the alleged coercion renders the case unmanageable as a class action. It also calls for inquiries that are precluded by *Illinois Brick*, namely, the extent to which the dealers gave way to coercion and passed on the artificially inflated charges to their own customers.

Also, in an earlier ruling in these cases (497 F.Supp. 218, 228 (C.D.Cal.1980)), this court held, for reasons therein discussed, that if the plaintiffs desire to pursue a theory of vertical conspiracy between the defendants and their dealers, they must join the dealers as defendants in the actions. The plaintiffs expressly have negatived any intention so to do; and, of course, such a step would inject so many individual issues as to make a class action practically impossible.

A third possible theory upon which the plaintiffs suggest that they may be able to avoid the *Illinois Brick* wall is to show that the arrangements between the defendants and their respective dealers were such that the physical transfer of gasoline from the former to the latter did not involve a "real sales transaction". The contention appears to be that a dealer had title to the gasoline for only a brief moment in the course of the transfer from the defendant wholesaler to

the consumer. Therefore, as I understand the argument, the dealer's position as a buyer was fictional and may be ignored and the consumer's purchase may be considered to have been made directly from the defendant wholesaler.

The relationships between the defendants and their dealers have not yet been displayed thoroughly in this litigation. Nonetheless, it is hard to accept the proposition that the dealers have played such an insignificant role in the distribution of gasoline. On the contrary, affidavits have been submitted by more than one hundred dealers asserting that they regularly determine for themselves the prices that they charge their gasoline customers, and that in doing so they take into account various market factors, including, but not limited to, the prices that they are charged by the defendants.

[4] In any event, pursuit of the theory here discussed cannot support a class action. It describes a consignment relationship between defendant and dealer, and such a relationship is, in itself, a vertical conspiracy in violation of the antitrust laws. *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). Thus, the plaintiffs would have to join, as defendants, all of the participating dealers, as was discussed in my earlier memorandum in this

matter (497 F.Supp. 218, 228 (C.D.Cal. 1980)).

From all of the foregoing, the conclusion appears inescapable that this court cannot properly ignore the participation of the retail dealers in the process of distributing gasoline from the defendants to the consumers. To do so would ignore the mandate of *Illinois Brick* and would fail to fulfill this court's obligation under Rule 23 of the Federal Rules of Civil Procedure.

The compelling nature of this conclusion is underlined by the current pendency of the antitrust litigation described in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977). It is a class action against most of the major oil companies that are defendants here, and is brought on behalf of all of their retail gasoline dealers. It charges the defendants with a horizontal conspiracy to require their dealers to acquiesce in antitrust conduct as a condition to retaining their leases. Thus, the plaintiff class in *Bogosian* are seeking to recover, as direct purchasers, substantially the same dollars in damages that the present plaintiffs' proposed class are seeking, as indirect purchasers, from the same defendants. If the plaintiff class in *Bogosian* and the proposed plaintiff class here were both to succeed, the result would be the double recovery,

trebled, that *Illinois Brick* envisaged and sought to forestall.

This court is aware of the likelihood that its refusal to certify the proposed class means that there is no practical way in which damages may be recovered for most individual gasoline purchasers, no matter how much the constantly increasing prices that they have paid may have stemmed from antitrust conduct on the part of the wholesale suppliers. However, this is the mandate of the Supreme Court in *Illinois Brick*. That decision laid down the doctrine that use of the treble damages weapon in the enforcement of the antitrust laws should be left altogether to the direct purchaser.

Accordingly, the plaintiffs' motion for certification of the proposed plaintiff individual consumer class is denied.

Pursuant to Title 28 U.S.C. § 1292(b), this court is "... of the opinion that ... [the order herein rendered] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation ...." Accordingly, such order is certified for interlocutory appeal.

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APPENDIX C

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION.

MDL No. 150 WPG.

United States District Court,
C. D. California.

July 29, 1980.

Order Aug. 26, 1980.

MEMORANDUM OF DECISION REGARDING STANDING AND ILLINOIS BRICK

WILLIAM P. GRAY, District Judge.

The states of Arizona, California, Florida, Oregon and Washington have brought actions against several major oil companies, alleging violations of federal and state antitrust laws. These cases have been consolidated in this court for pretrial proceedings. The defendants have moved to dismiss certain portions of the complaints on the grounds that the plaintiffs lack standing to sue under the antitrust laws or that the rule in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) precludes the plaintiffs from proving certain types of damages.

The motions to dismiss are directed against two causes of action set forth in the complaints.[1] The first cause of action in each complaint accuses the defendants of conspiring to restrain or monopolize interstate commerce in "the production, transportation, and refining of crude oil and the distribution and marketing of refined [petroleum] products." The complaints allege that this was accomplished by using the existing structure of the petroleum industry, together with horizontal agreements and concerts of action in violation of sections 1 and 2 of the Sherman Act. The second cause of action asserts that the defendants combined or agreed to restrain or monopolize commerce by creating "an artificial scarcity of crude oil and refined petroleum products within the United States"

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1. The first two causes of action alleged in the Arizona, California, Oregon and Washington complaints are nearly identical. There are minor variations in language and some additional overt acts are alleged in the California and Oregon complaints. Florida's complaint makes the same general allegations as the other states but is different in many of the overt acts alleged. In all, however, the major claims of the five complaints are quite similar and will be treated as identical for purposes of this discussion.

and in each plaintiff state. The plaintiffs complain that they, and those on whose behalf they sue, have been damaged by the price increases for refined petroleum products that resulted from the alleged antitrust violations.

I. *STANDING TO SUE FOR DAMAGES*

A. *Clayton Act § 4*

Each of the plaintiff states alleges that it is a purchaser or consumer of petroleum products. With the possible exception of Florida,[2] the plaintiffs' claims as purchasers are limited to purchases of refined petroleum products as opposed to crude oil. The claims for damages are made under Clayton Act § 4 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sus-

2. Florida's complaint is broad enough to include purchases of crude oil. However, Florida has never suggested in any of its other papers or in oral argument that it purchased crude oil. For purposes of this discussion, Florida's claims will be treated as limited to purchases of refined products.

tained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

In addition to the claims made on their own behalf, the states also assert claims as *parens patriae* under Clayton Act § 4C (15 U.S.C. § 15C) and as representatives of two classes of consumers. The first consumer class consists of all government entities that purchase refined petroleum products within the respective plaintiff states. The second class is composed of all other consumers of refined products within such plaintiff states.

[1] Standing to sue under Clayton Act § 4 consists of two elements. The claimant must show that the alleged violation of the antitrust laws (1) directly caused injury (2) to the claimant's "business or property." Defendants' motions first challenge whether the plaintiffs as consumers are injured in their business or property within the meaning of the statute. This court previously has concluded that consumers are persons injured in their business or property (see the memorandum of decision dated September 15, 1977). Since then, the Supreme Court has reached the same conclusion on that issue in *Reiter v. Sonotone Corp.*, 439 U.S. 1065, 99 S.Ct. 830, 59 L.Ed.2d 30 (1979).

[2, 3] The remaining issue with regard to standing is whether the plaintiffs have alleged injury within the meaning of section 4. The Fifth and Ninth Circuits, in which the various consolidated cases arise, agree that the appropriate test for injury is the so-called "target area" test.[3] *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturers Association*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973). The "target area" is "that area of the economy which is endangered by a

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3. The defendants argue in their papers that while the Fifth Circuit uses "target area" language to describe its test, it actually applies a more restrictive test for standing similar to the so called "direct injury" test applied by several other circuits. In *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976) a labor union and its members sued a tugboat firm and its union for conspiracy to monopolize tugboat services in the port of Mobile. The Fifth Circuit reversed a judgment dismissing the plaintiffs' claims and held that the plaintiffs, although employees, were within the area of the economy affected by the alleged violations and therefore had standing. This is very clearly an application of the "target area" test since the court focused on the economic impact of the violation rather than on the relationship between the parties.

break-down of competitive conditions in a particular industry." *Karseal Corporation v. Richfield Oil Corporation*, 221 F.2d 358, 362 (9th Cir. 1955). To apply the target area test, the area of the economy affected by the alleged violation must be identified, and then it must be determined whether the claimed injury occurred within that area. *In re Multidistrict*, 481 F.2d at 129.

[4] The first cause of action in the complaints of Arizona, California, Florida, Oregon and Washington alleges restraint of trade and monopolization in the petroleum industry as a result of the vertically integrated structure of that industry and certain horizontal combinations. The effects of these alleged violations are set forth most fully in the Washington complaint as follows:

"These violations of the Sherman Act have had the following effects, among others:

a. The acquisition and control by defendants of substantially all foreign crude oil imports into PAD V [the West Coast market area].

b. The acquisition or control by defendants of all California crude oil production.

c. The acquisition or control by defendants of substantially all pipeline

transportation of crude oil within California and PAD V.

d. The elimination of competition in the production of crude oil within California.

e. Arbitrary and artificial prices at which crude oil is purchased and sold within California.

f. Reduced competition in the sale of refined products within Washington and elsewhere in PAD V.

g. Increases in prices of refined products to artificial and noncompetitively high levels within Washington and elsewhere in PAD V."

Washington and the other state plaintiffs claim that they were damaged by the effect of antitrust violations on the prices they paid for petroleum products. They are not purchasers of crude oil; they do not use pipelines or other transportation facilities for crude oil; nor do they produce crude oil or market it. Therefore, the alleged injury could occur only in the "target area" described in paragraphs (f) and (g) above, the refined product market, and the plaintiffs have standing to sue for damages only as to those violations which affected this market.

[5] The second cause of action in these five complaints asserts that the defendants conspired to restrain trade and monopolize commerce by creating an artificial scarcity of crude oil and refined petroleum products. With respect to this allegation, the Washington complaint, for example, states:

"These violations of the Sherman Act have had the following effects, among others:

a. The prices of refined products within Washington and PAD V have been raised to artificial and noncompetitively high levels.

b. Independent refiners have been deprived of lower price domestic crude oil.

c. Competition by independent gasoline wholesales has been reduced.

d. Customers for refined products have been allocated among defendants.

e. Purchasers of refined products have been deprived of the benefits of free and open competition among the defendants and their co-conspirators and have been forced to pay more for refined products than they would otherwise have paid."

To the extent that the plaintiffs alleged that the conspiracy to create an artificial scarcity had an effect upon the refined pe-

troleum products market, the plaintiffs have standing to sue, that being the market in which they purchase. They do not have standing to sue for the effect of these acts upon the crude oil market or upon refiners of crude oil.

To summarize, the plaintiffs have alleged that they are purchasers of refined petroleum products. They have alleged further that the defendants restrained trade and monopolized commerce by engaging in certain horizontal combinations and agreements and by conspiring to create an artificial shortage of products. Finally, the plaintiffs have alleged that these illegal activities have had an effect upon the market for refined petroleum products. These allegations are sufficient to give the plaintiffs standing to sue under Clayton Act § 4. However, to the extent that the plaintiffs have alleged activities that are directed at crude oil exploration, production, importation, transportation or refining, the plain-

tiffs lack standing to sue for injuries occurring in those areas of the economy.[4]

B. *Clayton Act § 4C*

Section 4C of the Clayton Act provides, in part:

> "Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such state, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title." 15 U.S.C. § 15c(a)(1) 1976).

The elements of standing contained in section 4 of the Act are also present in

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4. The conclusions reached in this section also apply to the claims made by Arizona and California that the conduct alleged in their complaints constitutes violations of the antitrust laws of their respective states. Both Arizona Revised Statutes § 44-1408 (Suppl.1979) and California Business and Professions Code § 16750 (West Suppl.1979) contain language similar to Clayton Act § 4. This court concludes that the standing conferred by these state statutes is identical to that conferred by Clayton Act § 4. *See Saxer v. Philip Morris, Inc.*, 54 Cal.App.3d 7, 26, 126 Cal.Rptr. 327, 338 (1975).

section 4C. The plaintiff must show, in addition to authority to sue as *parens patriae*, that the natural persons in the state sustained (1) injury (2) to their property "by reason of" a violation of the Sherman Act.

[6] The plaintiffs' *parens patriae* claims are based on the same allegations of misconduct as are the plaintiffs' proprietary claims, and to the extent that the plaintiffs have standing to sue under section 4, they have standing to sue for damages as *parens patriae* under section 4C of the Act.

II. *STANDING TO SUE FOR INJUNCTIVE RELIEF*

The plaintiffs also ask for injunctive relief against the defendants under Clayton Act § 16 which provides:

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that causes loss or damage is granted by courts of equity." 15 U.S.C. § 26 (1976).

[7, 8] It has been observed frequently that the standing requirements under section 16 are broader than those under section 4 of the Act. To have standing under section 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979); *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1977). In meeting the first requirement, it must be alleged that the claimant will suffer irreparable harm and that there is no adequate remedy at law. 14 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 105.02[8] (1978). Only the Washington complaint expressly alleges irreparable injury to the state, its citizens and the members of the consumer classes. However, all of the state plaintiffs allege that defendants are engaged in continuing violations of the antitrust laws and that this conduct results in injuries to the plaintiffs. Injuries from continuing violations of regulatory statutes are cognizable in courts of equity, and therefore the complaints will be construed liberally to meet the first requirement for standing under section 16.

The requirement that the plaintiffs show that their injuries were proximately caused

by the alleged antitrust violations is essentially the same under sections 4 and 16 of the Clayton Act. It already has been concluded that plaintiffs have standing under section 4 to sue for violations of the antitrust laws that affect the market for refined petroleum products. Plaintiffs likewise have standing to seek injunctive relief under section 16 within the same limits.

[9] As the Supreme Court noted in *Hawaii v. Standard Oil of California*, 405 U.S. 251, 261, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972) ". . . one injunction is as effective as 100." It is of little practical significance that a state has standing to sue for injunctive relief as *parens patriae* if the state also has standing to sue for injunctive relief in its proprietary capacity. For whatever it is worth, this court must conclude that plaintiffs have standing to sue for injunctive relief as *parens patriae* within the limitations previously mentioned.

III. *ILLINOIS BRICK*

The decision of the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) has had a significant impact on the scope of private antitrust enforcement under Clayton Act § 4. It held that an indirect purchaser from a person that violates the antitrust laws

may not recover damages in an action under section 4. The Court rejected the argument that the claimant could prove damages by showing that the direct purchaser, a middleman that was charged an excessive price by the wrongdoer, passed on all or some of the overcharge to the claimant. The rationale for this decision was that (1) allowing proof of passed–on overcharges would greatly complicate antitrust treble damage suits, (2) defendants would be threatened with multiple liability if suits were brought by both direct and indirect purchasers, and (3) permitting use of the pass–on theory would give both direct and indirect purchasers inadequate incentive to sue since neither could recover the full amount of the overcharge.

The Supreme Court suggested two narrow exceptions to its rule against indirect purchaser claims. These exceptions were mentioned in the course of a discussion of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), in which the Court had held that an antitrust defendant could not avoid payment of damages to a direct purchaser by claiming that some of the overcharge had been passed on to someone else. In *Illinois Brick*, the Court acknowledged that the reasons for the *Hanover Shoe* rule

would not apply where the indirect purchaser had a contract with the direct purchaser for a fixed quantity of goods to be priced at cost plus a specific markup and such contract pre-dated the antitrust activity of the defendant. In a footnote to this discussion, the Court suggested a second exception, that the pass-on defense might be permitted where the direct purchaser "is owned or controlled by its customer." 431 U.S. at 736, n.16, 97 S.Ct. at 2070, n.16.

A. *Claims Alleging Conduct (Other Than Price Fixing) Aimed at Crude Oil Producers, Refiners and Marketers*

[10] This court has already concluded that the plaintiffs lack standing to sue for antitrust violations affecting crude oil production, refining, or marketing. Even if the plaintiffs had standing in these areas, *Illinois Brick* would prevent the plaintiffs from recovering damages. Anticompetitive activity at levels of the petroleum industry above the wholesale and retail marketing levels, except as incidental to a price fixing conspiracy involving wholesale or retail prices, would injure plaintiffs only indirectly. *Illinois Brick* provides an independent ground for dismissal of such claims.

B. *Price Fixing Claims*

[11] The rule of *Illinois Brick* is that in private antitrust actions under Clayton Act § 4, the claimant may recover only for damages incurred in a purchase directly from the wrongdoer. Subject to the following three exceptions, this is the rule that will be applied to plaintiffs' price fixing claims.

[12] First, the plaintiffs may recover from the defendants for any illegal overcharges paid directly to the defendants' co-conspirators. In *City of Atlanta v. Chattanooga Founding and Pipeworks*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) a municipality that bought pipe from conspiring pipe manufacturers was allowed to recover from the defendant for overcharges paid to the defendant's co-conspirator. The reason for this result is that conspirators are mutual agents and each is liable for the acts of the other. *Illinois Brick* does not alter this rule since no pass-on of overcharges is involved.

[13] Second, the plaintiffs may recover from the defendants for indirect purchases made under pre-existing, fixed-quantity, cost-plus contracts with the direct purchaser. In announcing its decision in *Illinois Brick*, the Supreme Court made it clear that "[the] use of pass-on will be permitted sym-

metrically, if at all." 431 U.S. at 737, n.18, 97 S.Ct. at 2070, n.18. The Court recognized an exception to *Hanover Shoe* where the direct and indirect purchasers have a pre-existing cost-plus contract, and this exception must be applied to the benefit of both plaintiffs and defendants. None of the plaintiffs in the present cases has alleged that they were parties to such contracts, although Washington asserts that it suffered damage "in connection with purchases under circumstances which are the economic equivalent of pre-existing cost-plus contracts." (Washington is also the only state plaintiff to have had the benefit of reading the *Illinois Brick* decision before filing its complaint.) To the extent that a plaintiff can allege and prove that it held pre-existing, fixed-quantity, cost-plus contracts with its suppliers, it may avoid the impact of *Illinois Brick*. The court cannot at this time decide whether there are other circumstances that are the "economic equivalent" of cost-plus contracts or whether such circumstances would be recognized as exceptions to the *Illinois Brick* rule.

[14] Third, the plaintiffs will be allowed to recover from the defendants for overcharges passed on by entities owned or controlled by the defendants. In connection with its discussion in *Illinois Brick* of the rule in *Hanover Shoe*, the Supreme Court, in the now famous footnote 16, stated:

"Another situation in which market forces have been superseded and the pass–on defense might be permitted is where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736, n.16, 97 S.Ct. at 2070, n.16.

At least two federal circuits[5] appear to have recognized that the reasoning behind the footnote 16 exception applies to both offensive and defense uses of the pass–on theory.

In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3rd Cir. 1978) involved allegations of price fixing by sugar refiners. The plaintiff, a wholesale distributor of candy, purchased candy from a subsidiary of one of the defendant refiners. The district court entered summary judgment for the defendants on the basis of *Illinois Brick*. The Third Circuit reversed and held that the subsidiary would be treated as the alter ego of the parent sugar refiner. "To adopt any other view would invite evasion by the simple expedient of inserting a subsidiary between the violator and the first noncontrolled purchaser." 579 F.2d at 19.

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5. In *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) the Fifth Circuit discussed a "control" exception to *Illinois Brick* but concluded that such an exception would not apply in the case before it.

In *Royal Printing, Inc. v. Kimberly–Clark Corporation*, 621 F.2d 323 (9th Cir. 1980) the Ninth Circuit recognized a control exception to *Illinois Brick* by permitting a purchaser of paper products to sue paper manufacturers for antitrust violations even though the plaintiff had made its purchases through divisions or subsidiaries of the defendant manufacturers. The marketing entities carried the products of their parent corporations and other paper manufacturers, so that, in some purchases, the manufacturer did not own the supplier, but the supplier was owned by one of the participants in the conspiracy. The Ninth Circuit recognized that there was a small chance that the marketing companies might sue the parent or its co–conspirator and that there was a remote chance of imposing multiple liability on the defendants, but concluded that the broader interest in effective antitrust enforcement required that the indirect purchaser be allowed to bring suit in this situation.

[15] On the basis of these decisions, this court is able to conclude that an indirect purchaser that purchases from an entity owned or controlled by the wrongdoer may sue to recover passed–on overcharges and is excepted from the general rule of *Illinois Brick*. The question of how much control is

required to meet the exception cannot be decided until a factual record is developed. The degree of ownership, profit taking, or ability to set prices will be important considerations in determining whether the intermediate seller is "controlled."

To summarize, with respect to the plaintiffs' claims that the defendants conspired to fix prices either at the wholesale or retail level, the plaintiffs will be allowed to seek recovery only as to direct purchases from a defendant, a co-conspirator, sellers with whom the plaintiffs had pre-existing, fixed-quantity, cost-plus contracts, or an entity controlled by a conspirator.

C. *The Umbrella Theory*

[16] The plaintiffs have argued that where a price fixing conspiracy exists in a market, non-conspirators are able to charge higher prices than in a competitive market. The price fixed by the conspiracy is said to create a price "umbrella" allowing non-conspirators in the market to raise their prices. The plaintiffs contend that a purchaser from a non-conspirator should be allowed to recover from the conspirators the difference between the competitive market price and the higher price in the constricted market. The plaintiffs correctly observe that *Illinois Brick* does not specifically address this situation since the price charged by

non-conspirators does not contain any overcharge passed on from the defendants. However the reasoning behind *Illinois Brick* is applicable to the umbrella pricing theory and prompts this court to conclude that recovery should not be allowed under such a theory.

This court will follow the decision of the Third Circuit in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979). The defendants in that case were accused of fixing the price of paper packaging for consumer goods. The Court of Appeals affirmed a grant of summary judgment dismissing the suit as to a plaintiff, Murray's, which purchased paper bags from a non-conspiring competitor of the defendants at prices allegedly made possible only by the umbrella effect of the conspirators' prices. The court rejected the umbrella theory for three reasons. First, Murray's had no direct relationship with the defendants and the defendants gained nothing from Murray's purchases. Second, the non-conspiring competitors were free to set prices as they wished and might have charged the same price without regard to the defendants' conduct. Third, the antitrust laws would be enforced most effectively by the direct purchasers from the defendants.

The result in the *Mid-West* case is consistent with the teachings of *Illinois Brick*. *Illinois Brick* limited proof of passed-on overcharges because (1) such proof would involve complex economic analysis, (2) the defendant might be exposed to multiple liability and (3) the effectiveness of the treble damage remedy might be destroyed. Similar problems are involved in the umbrella theory of recovery.

First, proof of injury under the umbrella theory would involve complex economic analysis. The non-conspirator makes independent decisions concerning price and output. In order for a plaintiff to recover, the effect of the umbrella price on these pricing and output decisions would have to be shown. This sort of analysis is exactly what the Supreme Court sought to avoid in *Illinois Brick*.

Second, where the plaintiff is allowed to recover from a defendant for excessive prices charged by a non-conspirator, the defendant is not disgorging illegally earned profits—these have gone to the competitor. There is a possibility for ruinous recovery in allowing treble damages to be awarded in such circumstances.

Third, the direct purchaser from the defendant is the most effective enforcer of the antitrust laws. In a price fixing situation, both purchasers from the defendant and purchasers from non-conspirators are potentially injured. The purchaser from the non-conspirator might be able to prove price fixing by the defendant but be unable to quantify the injury. Normally, the direct purchaser would have much less difficulty in this respect. The direct purchaser has the greatest incentive to sue and the easiest case to prove and would be, therefore, the most effective enforcer of the antitrust laws.

For these reasons, the plaintiffs will not be allowed to prove damages incurred in purchases from non-conspiring competitors of the defendants. Claims based on such purchases will be dismissed.

D. *Vertical Conspiracy*

The plaintiffs have suggested in their papers that they may be able to prove a conspiracy between the defendant oil companies and the independently owned retail service stations that sell defendants' refined products under brand names. The plaintiffs assert that proof of such a vertical conspiracy would not be barred by *Illinois Brick*. There is authority for plaintiffs'

arguments in *Gas-A-Tron v. American Oil Company*, 1977-2 Trade Cases (CCH) ¶ 61,-789 (D.Ariz.1977).

However, the plaintiffs have not, as yet, alleged a vertical conspiracy between the oil companies and retail dealers. This court is not inclined to entertain such an allegation unless such retail dealers are joined as defendants in these lawsuits. The reasons for requiring joinder of co-conspirators are set forth in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). In that case, cattle producers sued retail supermarkets for setting depressed beef prices. In order to avoid the impact of *Illinois Brick*, the plaintiffs offered to amend their complaints to allege that the supermarkets had conspired with packers and slaughterhouses to set market prices for beef cattle. The plaintiffs contended, as do plaintiffs in this action, that such a conspiracy would be excepted from the rule in *Illinois Brick*. The Fifth Circuit responded as follows:

> "Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of Illinois Brick permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding

one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co–conspirator doctrine from recovering damages from the retail chains. . . . Because the packers are not parties to this suit, the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable." 600 F.2d at 1163.

Accord, Dart Drug Corporation v. Corning Glass Works, 480 F.Supp. 1091 (D.Md.1979).

[17] The plaintiffs are entitled to prove their case by showing that the defendant oil companies conspired with retail dealers to set prices at the retail level. However, if they intend to pursue this theory of liability, they must allege a vertical conspiracy in their complaints and join the retail dealers as parties defendant.

E. *Injunctive Relief*

[18] The defendants have argued in their motions that *Illinois Brick* places the same limitations on claims for injunctive relief as on suits for damages. The defendants reason that since the plaintiffs must show injury to obtain injunctive relief and since proof of injury to an indirect purchaser would involve the same complex calculations as proof of damages, *Illinois Brick* bars recovery.

This argument has been rejected by the Third and Fifth Circuits and a district court in Maryland. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979); *In re Beef Products Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979); *Dart Drug Corporation v. Corning Glass Works*, 480 F.Supp. 1091 (D.Md.1979). The courts have reasoned that, first, in a suit for injunctive relief the plaintiff does not have to quantify his injury and therefore complex economic analysis is not necessary. Second, the defendant in a suit for injunctive relief is not threatened with multiple liability since no damages are awarded. Third, a bar against suits for injunctive relief by indirect purchasers would leave a significant gap in antitrust enforcement where the federal government or direct purchasers are unwilling to bring suit. Therefore none of the reasons given for the

rule in *Illinois Brick* apply to claims for injunctive relief under section 16. This court accepts the above-mentioned reasoning and will follow it in the present case.

IV. *CONCLUSION*

For the reasons expressed above, the defendants' motions to dismiss will be granted in part and denied in part as follows:

First, claims of conduct, other than price fixing, directed against the exploration, production, transportation, marketing or refining of crude oil will be dismissed for lack of standing under Clayton Act §§ 4 and 4C.

Second, even if the plaintiffs had standing to sue for damages resulting from antitrust violations other than price fixing in the exploration, production, transportation, marketing or refining of crude oil, *Illinois Brick* would prevent them from proving damages and would require that these claims be dismissed.

Third, to the extent that the plaintiffs claim that the defendants violated the antitrust laws by setting or manipulating prices at the wholesale or retail levels, the plaintiffs will be allowed to seek damages only as to direct purchases from defendants, their co-conspirators, sellers with whom plaintiffs had fixed-quantity, cost-plus

contracts pre-dating the alleged violations, or entities owned or controlled by defendants.

Fourth, the plaintiffs will not be allowed to recover damages for purchases made from firms that competed with defendants but did not conspire with them to violate the antitrust laws.

Fifth, the plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the retail dealers are joined as parties defendant.

Sixth, the plaintiffs are entitled to seek injunctive relief for antitrust violations directed against the refined product market regardless of whether the plaintiffs purchased directly or indirectly from the defendants.

REVISED ORDER REGARDING STANDING AND ILLINOIS BRICK

The order filed by this court on July 29, 1980, regarding standing and *Illinois Brick* is hereby withdrawn and the following substituted:

For the reasons set forth in the memorandum of decision accompanying this order, IT IS HEREBY ORDERED:

First, all claims of antitrust violations directed against the exploration, production, transportation, marketing or refining of crude oil, other than claims of fixing wholesale or retail prices of refined products, are dismissed.

Second, to the extent that the plaintiffs claim that the defendants violated the antitrust laws by setting or manipulating prices at the wholesale or retail levels, the plaintiffs will be allowed to seek damages only as to direct purchases from the defendants, their co–conspirators, sellers with whom plaintiff had fixed–quantity, cost–plus contracts pre–dating the alleged violations, or entities owned or controlled by the defendants or their co–conspirators.

Third, all claims for damages based on purchases from firms that competed with the defendants but did not conspire with them to violate the antitrust laws are dismissed.

Fourth, the plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the conspiring retail dealers are joined as parties defendant.

Fifth, the plaintiffs may seek injunctive relief for antitrust violations directed against the refined product market regardless of whether the plaintiffs purchased directly or indirectly from defendants or their co–conspirators.

* * *

APPENDIX D

15 U.S.C. Section 1

Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX E

15 U.S.C. Section 15

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

No. 82 - 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Pursuant to Supreme Court Rule 22.6, petitioners wish to inform the Court that the issues raised in this petition for a writ of certiorari, are related to those in Merican et al. v. Caterpillar Tractor Co., No. 83-914, in which respondent's brief in opposition was filed January 4, 1983.

Dated: January 9, 1984

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Did the Ninth Circuit correctly conclude that the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in the absence of proof of a plaintiff's right to rely on an exception to that rule, bars indirect purchasers of gasoline such as petitioners from claiming under Clayton Act § 4 that an alleged wholesale overcharge imposed by respondent refiners on direct purchasing service station dealers was passed on to petitioners in their purchases from such dealers?

THE PARTIES BELOW

The respondents are defendants in the district court and were appellees in the court of appeals, not appellants as the petition states.* (Petition at ii.)

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* Respondents are Atlantic Richfield Company, Cities Service Company and Cities Service Oil Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company of California, Standard Oil Company (Indiana), Sun Company, Inc., Texaco, Inc., and Union Oil Company of California. Pursuant to Supreme Court Rule 28.1, the parents, affiliates and subsidiaries (other than wholly owned subsidiaries) of respondents are listed in the appendix. Although identified as a respondent in the petition, the Standard Oil Company (Ohio) was dismissed from this litigation over a year ago.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit.[1]

Statement Of The Case

Petitioners, plaintiffs below, ask this Court to review the Ninth Circuit's disposition of two separate interlocutory appeals that were heard and decided together, as described below. The petition should be denied because it raises no novel or unsettled issue of law; instead, it merely attempts to relitigate the rule barring antitrust claims by indirect purchasers. This Court squarely addressed and resolved that issue in

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1. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982), *aff'g* 523 F. Supp. 1116 (C.D. Cal. 1981) and 497 F. Supp. 218 (C.D. Cal. 1980).

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ("*Illinois Brick*") and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*"), discussed below.

A. The Rulings Of The District Court

This litigation consists of five antitrust treble-damage actions filed from 1973 through 1977, which have been consolidated in the United States District Court for the Central District of California for coordinated pretrial proceedings. The complaints seek damages under Clayton Act § 4 on behalf of the named plaintiffs and classes of tens of millions of other indirect retail purchasers whom plaintiffs purport to represent under Fed. R. Civ. P. 23. Plaintiffs allege, *inter alia*, that defendants conspired to raise and stabilize the price of gasoline. However, with minor exceptions not material to the petition, defendants do not sell gasoline directly to plaintiffs and other consumers at retail. Instead, such consumers purchase gasoline indirectly at retail from some 35,000 independent dealers in the five plaintiff states who in turn purchase directly from defendants (or, in some cases, from jobbers supplied by defendants).

1. The 1980 Rulings On Motions Addressed To The Complaints

Defendants, pursuant to Fed. R. Civ. P. 12, moved to dismiss on the ground, *inter alia*, that indirect purchasers such as plaintiffs cannot sue to recover an alleged wholesale overcharge purportedly passed on to plaintiffs by intervening direct purchasers. That motion originally was based on *Hanover Shoe*. While defendants' motion was pending, however, this Court in *Illinois Brick* explicitly barred antitrust claims by indirect purchasers (rejecting the arguments of the present petitioners, who appeared as *amici curiae*). After extensive further briefing and argument on the implications of *Illinois Brick*, the district court in 1980 entered, *inter alia*, three rulings on defendants' Rule 12 motions.

First, the district court held that plaintiffs' claims based on indirect purchases are barred by this Court's decision in *Illinois Brick* unless plaintiffs were to prove their right to rely on either of two specific exceptions to the *Illinois Brick* rule. The district court stated that it would permit recovery (1) where plaintiffs had pre-existing, fixed-quantity, cost-plus contracts with direct purchasers, or (2) where the direct purchaser was "owned or controlled" by a defendant or a co-conspirator. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 225-26 (C.D. Cal. 1980); Petition at C-16 to 18. The relevant language from the district court's order is set forth in the margin.[2]

Second, the district court dismissed plaintiffs' so-called "umbrella" claims based on purchases from non-conspiring competitors of defendants on the grounds that (a) proof that a non-conspiring "umbrella" seller's pricing decisions were affected by the conspiracy would require complex economic evidence of the sort this Court sought to avoid in *Illinois Brick*, (b) permitting "umbrella" claims would subject defendants to excessive and potentially ruinous recovery for acts that by definition did not enrich the alleged conspirators, and (c) direct purchasers from conspirators still would be able to press their claims, thereby avoiding any gap in the scheme of private antitrust enforcement. *Id.* at 227-28; Petition at C-22 to 23.

Third, addressing plaintiffs' attempt to circumvent *Illinois Brick* by asserting vertical conspiracy between defendants and dealers to fix the dealers' resale prices, the district court ruled that plaintiffs could not amend their complaints to allege vertical conspiracy unless they named such dealers as defen-

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2. "* * * [T]o the extent that the plaintiffs claim that the defendants violated the antitrust laws by setting or manipulating prices at the wholesale or retail levels, the plaintiffs will be allowed to seek damages only as to direct purchases * * * from the defendants, their co-conspirators, sellers with whom plaintiffs had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the defendants or their co-conspirators." 497 F. Supp. at 229; Petition at C-29.

dants. The district court reasoned that in the absence of such joinder the dealers would not be bound by a finding of vertical conspiracy in these cases. They would be free to sue defendants on the theory that they paid a simple wholesale overcharge, thereby raising the prospect of double recovery which this Court's *Illinois Brick* rule is designed to avoid. *Id.* at 228; Petition at C-24 to 25.

Plaintiffs sought, and obtained, district court certification of only the second and third rulings described above (*i.e.*, the "umbrella" and "vertical conspiracy" rulings) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Ninth Circuit in December 1980 granted the plaintiffs' petition pursuant to § 1292(b) for permission to take an interlocutory appeal.

2. The 1981 Denial Of Consumer Class Certification

The second appeal before the Ninth Circuit had its genesis in September 1980, when petitioners moved for certification of their proposed consumer classes. The district court, relying on a substantial factual record, denied that motion in September 1981. The ground for this decision was that putative consumer class members were indirect purchasers whose claims either were barred outright by the rule of *Illinois Brick*, or would require proof that thousands of dealers were "controlled" by their suppliers within the meaning of a purported exception to *Illinois Brick* or were engaged in vertical price-fixing conspiracies with their respective suppliers. The district court concluded from the factual record before it that such proof could only be offered on a dealer-by-dealer basis; there was no class-wide evidence that could suffice. Plaintiffs' proposed consumer classes therefore failed to meet the requirement of Fed. R. Civ. P. 23(b)(3) that common issues predominate over individual issues. The district court accordingly declined to certify them. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 523 F. Supp. 1116, 1119 (C.D. Cal. 1981); Petition at B-5.

This decision, too, was certified for interlocutory appeal under 28 U.S.C. § 1292(b). The Ninth Circuit in November 1981 granted plaintiffs' petition for permission to appeal the denial of class certification, and ordered that such appeal be argued with the earlier interlocutory appeal described above.

B. The Decision Of The Ninth Circuit

On November 9, 1982, the Ninth Circuit issued a unanimous decision affirming the district court. The court approved the district court's fundamental holding that *Illinois Brick* barred these plaintiffs' indirect-purchase claims.[3] It went on specifically to affirm the district court's "umbrella", vertical conspiracy and class certification rulings.

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3. The court's approval of the district court's application of *Illinois Brick* is apparent throughout the decision. Thus the court affirmed the district court's ruling that plaintiffs could not attempt "* * * to circumvent *Illinois Brick*" by alleging vertical conspiracy between defendants and dealers without joining such dealers as defendants. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341; Petition at A-15. Moreover, the court held that unless such dealers were joined in the action and bound by its results there would inevitably arise the potential for duplicative recovery forbidden by *Illinois Brick*. The court refused to relax this rule where the statute of limitations assertedly had run on the direct purchase claims of particular dealers, because it was "* * * unwilling to countenance *ad hoc* case-by-case exceptions * * *" to the *Illinois Brick* rule. *Id.* at 1342; Petition at A-18 (citing *Illinois Brick*, 431 U.S. at 743-45). The Ninth Circuit also affirmed the denial of consumer class certification because any attempt "* * * to by-pass the rule in *Illinois Brick* * * *" on behalf of class members whose indirect-purchase claims are barred by the *Illinois Brick* rule would raise dealer-by-dealer issues. *Id.* at 1342; Petition at A-19.

While approving the district court's application of *Illinois Brick* to plaintiffs' claims, the Ninth Circuit stated that it was not reviewing that portion of the district court's 1980 order dealing with possible "cost-plus" and "control" exceptions to the bar against indirect purchase claims because that part of the district court's decision had not been certified for interlocutory appeal and it was unnecessary to reach those issues in order to decide the rulings before the court. *Id.* at 1338 n.1, 1343; Petition at A-4 n.1, A-20.

The Ninth Circuit rejected plaintiffs' argument, which they now seek to present to this Court, that *Illinois Brick* does not apply to an indirect purchaser's claim that manufacturers horizontally conspired to fix the retail prices charged by the middleman from whom the plaintiff bought. That argument was presented to the Ninth Circuit both in petitioners' briefs, and in their motion for rehearing and rehearing *en banc*. Indeed, the full court was advised of petitioners' suggestion for rehearing *en banc*, but no judge of the Ninth Circuit even requested a vote on this suggestion. That the Ninth Circuit saw no need to discuss this theory is not surprising, because, as shown below, it is a transparent attempt to evade this Court's clear rule against indirect-purchaser claims.

REASONS FOR DENYING THE WRIT

I.

THE APPLICATION OF THE *ILLINOIS BRICK* RULE TO THE CLAIMS OF THESE INDIRECT PURCHASERS PROVIDES NO GROUND FOR REVIEW

A. The Rulings Below Provide No Occasion For Review By Certiorari Because They Are A Textbook Application Of *Illinois Brick*

1. *Illinois Brick* Assigns The Antitrust Enforcement Role To Direct Purchasers, Not Indirect Purchasers

In *Illinois Brick*, the Court held that an indirect purchaser cannot sue to recover an alleged overcharge imposed on the direct purchaser and purportedly passed on to the indirect purchaser. 431 U.S. at 728-29. The Court based this rule of general application on two rationales. First, in its earlier *Hanover Shoe* decision, the Court had held that the direct purchaser will be deemed injured in the full amount of the overcharge, and that the defendant may not attempt to diminish the direct purchaser's recovery by offering evidence to prove that all or part of an overcharge was passed on to the

indirect purchasers. 392 U.S. at 487-88. The Court was not prepared to alter that rule. Consequently, if indirect purchasers were also permitted to recover, defendants would be subjected to a risk of multiple treble-damage liability for a single overcharge. The Court found this possibility unacceptable. 431 U.S. at 730-31 & n.11. Second, the Court's decisions in both *Illinois Brick* and *Hanover Shoe* were designed to avoid reliance on the complex, speculative economic evidence that would be required in any attempt to show the extent, if any, to which an alleged wholesale overcharge was passed on to an indirect purchaser.[4] 431 U.S. at 731-33 & n.13; 392 U.S. at 492-93.

Petitioners assert that the lower courts have erred by "extending" *Illinois Brick* in some novel fashion to bar *their* indirect-purchase claims.[5] They offer three arguments in support of this position. First, they assert that they are not seeking to recover a passed-on overcharge. Second, they say that there is no other purchaser who will bring suit against these defendants. Finally, petitioners argue that the application of *Illinois Brick* makes these cases more rather than less complex. As

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4. Recently the Court has twice cited *Illinois Brick* as a sound precedent and has shown no inclination to reconsider the rule. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, ____ U.S. ____, 103 S. Ct. 897, 912 (1983) (citing *Illinois Brick* in discussion of need to keep antitrust cases manageable by avoiding reliance on complex, speculative theories of recovery); *Blue Shield v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 2546 (1982).

5. The Ninth Circuit, while approving the district court's holding that *Illinois Brick* bars plaintiffs' claims, did not explicitly discuss such holding. (*See* p. 5 n.3, above.) Indeed, in declining to address the issue of whether a purported "control" exception exists, the Ninth Circuit noted that the district court had not certified the paragraph of its order inferring that exception, which paragraph also sets forth the district court's fundamental holding that *Illinois Brick* applies. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1338 n.1; Petition at A-4, n.1. Certiorari should not issue to review a district court ruling that the Ninth Circuit, while accepting, has not fully discussed.

shown below, each of these arguments is demonstrably without merit.

2. Petitioners Are Indirect Purchasers Pressing Exactly The Type Of Claims That The Court Barred In *Illinois Brick*

Contrary to petitioners' suggestion that the courts below have extended *Illinois Brick* to some novel and unforeseen situation (see, *e.g.*, Petition at 9), these cases present exactly the industry pattern to which the rule of *Illinois Brick* is addressed. Thus, defendants are manufacturers of gasoline. They made outright sales of that gasoline to some 35,000 independent dealers (or to jobbers who in turn supplied such dealers) for which defendants charged the dealers a wholesale price. The dealers in turn set their own retail prices, which they charged to consumers such as the plaintiffs. During the period relevant to these cases defendants' wholesale prices changed frequently as a result of the granting and withdrawal of temporary discounts that were designed to assist dealers in maintaining their sales volume during "price wars" in the retail market. The record before the Ninth Circuit established that there was no set relationship between the wholesale prices the dealers paid and the retail prices they charged. While some defendants suggested retail prices to their dealers, many dealers disregarded such suggestions.[6] The dealers also were free, if they believed they had been subjected to an unlawful wholesale overcharge, to sue their suppliers under the antitrust laws. Petitioners admit that dealers file such suits. Petition at 15.

Plaintiffs' indirect purchase claims present precisely the two problems that led this Court to adopt the rule of *Illinois Brick*.

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6. In opposing the class certification motions, defendants presented the district court with a substantial factual record demonstrating that both wholesale and retail gasoline prices constantly fluctuated, and that there was no set relationship between them. In particular, defendants demonstrated that when wholesale prices were raised through withdrawal of discounts, some dealers passed on the full amount of such increases by raising their retail prices, but many others absorbed the increases in whole or in part. 523 F. Supp. at 1119; Petition at B-6 to 7.

As discussed in more detail below, there would be a clear risk of multiple liability if both direct and indirect purchasers were permitted to sue. See pp. 12-14, below. Moreover, plaintiffs' claims are infused with the complexity *Illinois Brick* is designed to avoid because any attempt to prove such claims would require proof of the extent, if any, to which thousands of individual dealers sought to pass on wholesale overcharges in an environment of constantly fluctuating wholesale and retail prices. See p. 14, below.

Petitioners say that *Illinois Brick* should not apply to this industry because the defendants' wholesale sales to dealers assertedly did not constitute a genuine "intervening wholesale market" and because defendants assertedly conspired among themselves to fix the retail prices charged by dealers instead of the wholesale prices that defendants charged. *E.g.*, Petition at 4. As demonstrated below, this theory which was rejected by both lower courts is merely hollow rhetoric designed as an attempt to keep alive a claim of the type that this Court has explicitly rejected. Indeed, the petition on its face demonstrates (1) that petitioners are indirect purchasers; (2) that defendants allegedly restrained competition in the wholesale market; (3) that this wholesale restraint allegedly enabled defendants to extract a wholesale overcharge from dealers; and (4) that this alleged wholesale overcharge was passed on in the allegedly inflated retail price that the dealers charged to consumers.

The petition admits that plaintiffs and the other consumers they sought to represent are indirect purchasers. It states that "* * * almost all of the branded retail outlets were actually operated by franchised dealers," Petition at 4, so that "* * * in form defendants mostly sold indirectly to retail consumers * * *," Petition at 10. *See also* Petition at 8 (Only "[a] small portion of defendant's sales was direct to consumers * * *.")

Petitioners also admit that defendants charged dealers a wholesale price for gasoline and that defendants allegedly imposed a restraint which eliminated competition at the wholesale level. Petition at 16. Thus, petitioners' repeated claim that "* * * there is no wholesale market * * *" in this industry is

nothing more than a claim that there has been a restraint on wholesale competition. Petition at i. Petitioners describe the alleged wholesale restraint as a coercive exclusive-dealing arrangement: "* * * [T]here is no wholesale market in which to fix prices. Defendants' dealers are captive—they can only buy their gasoline from the defendant whose trademarked station they tend. Defendants did not compete for wholesale sales to dealers and did not fix dealer wholesale prices—they had no reason to do so." Petition at 10; *see also* Petition at 16.

Although plaintiffs argue that these cases involve only a retail overcharge, their petition shows that they in fact claim that the alleged wholesale restraint enabled defendants to charge the dealers supracompetitive wholesale prices.[7] Thus, they say that defendants set the wholesale price so as to give dealers "* * * appropriate margins in light of the fixed retail price levels." Petition at 13. Presumably the "appropriate margin" referred to in this sentence is no greater than the dealer would have obtained if the retail price had not been raised by the alleged conspiracy. If wholesale prices had been set to give the dealers the same "appropriate margins" in light of a lower, assertedly competitive retail price, *a fortiori* the wholesale prices would have been lower too. What the plaintiffs are saying, then, is that both the wholesale price *and* the retail price were set at supracompetitive levels.[8] Indeed, a

7. The *Illinois Brick* rule applies to this situation even though plaintiffs choose not to characterize the alleged wholesale restraint as price-fixing. Indeed, in *Hanover Shoe*, the seminal case on this issue, the overcharge allegedly was extracted from the direct purchaser by unlawful monopolization rather than by a conspiracy to fix prices. 392 U.S. at 483.

8. Plaintiffs cite *Phillips v. Crown Central Corp.*, 602 F.2d 616, 626 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), for the proposition that oil companies who sell to dealers somehow can enter into a "horizontal" agreement to fix those dealers' resale prices. Petition at 17. *Crown* does not support this argument. The *Crown* plaintiffs were four dealers who claimed that their supplier (a company that is not a respondent here) coerced such dealers into setting retail prices of the supplier's choosing; the dealers proved that claim with hard-core evidence of vertical conspiracy to fix their resale prices. *Id.* at 627.

supracompetitive wholesale price is essential to plaintiffs' theory, since they otherwise would be contending that defendants conspired to elevate the retail prices charged by dealers in order to enrich the dealers rather than themselves.

Finally, petitioners say that the restraint which eliminated the "intermediate market" at the wholesale level somehow enabled defendants to fix the dealers' retail prices. But this contention cannot prevent the application of *Illinois Brick*. The dealers were the direct purchasers of the gasoline, and as such they had the legal right to set its retail price.[9] In such circumstances there are only two ways that a defendant, as a wholesale seller, could affect a dealer's retail price: either (1) by an increase in the wholesale price which the dealer independently chose either to absorb, or to pass on in whole or in part, or (2) by vertical conspiracy, *i.e.*, agreeing with or coercing the dealer to set a retail price. *Illinois Brick* bars directly the first theory. And the second is not part of these cases because plaintiffs have never pleaded it.[10]

Clearly, analysis of plaintiffs' own description of their claims shows that such claims are of exactly the type barred by the *Illinois Brick* rule. Plaintiffs' assertion that the lower courts erred by refusing to "accept plaintiffs' allegations" is wrong. Petition at 16 n.5. The district court accepted, as it should in considering a motion under Fed. R. Civ. P. 12, plaintiffs' allegation of a conspiracy to fix retail prices, and its *Illinois Brick* ruling bars indirect purchase claims for both wholesale and retail price-fixing. *In re Coordinated Pretrial Proceedings*

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9. As the Ninth Circuit noted from the factual record amassed on the class certification motions, defendants' contracts with dealers did not purport to give defendants the right to set the dealers' retail prices. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1343; Petition at A-20.

10. Petitioners' reason for not pleading vertical conspiracy appears to be the abundant precedent holding that such a theory would require dealer-by-dealer proof of coercion, precluding class certification. See p. 19 n.20, below.

in Petroleum Products Antitrust Litigation, 497 F. Supp. 218, 229 (C.D. Cal. 1980); Petition at C-29. However, Rule 12 does not shield the allegations of a complaint from analysis. The district court obviously had to consider what an allegation of "retail price-fixing" by a wholesale seller could mean. As shown above, it can only mean either a pass-on or vertical conspiracy; plaintiffs have never described to the district court or the Ninth Circuit any theory of "retail price-fixing" that is not one or the other.[11]

The analysis that the district court performed here was no different in scope from that engaged in by this Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, ____ U.S. ____, 103 S. Ct. 897 (1983). Although that case came up solely on the pleadings, the Court analyzed the plaintiff union's claim of injury to determine just how the alleged conspiracy to coerce landowners and general contractors into dealing with nonunion subcontractors could have injured the plaintiff union. *Id.* at 902-04, 908-11. The district court did no more than that here.

3. These Cases Present The Risk Of Multiple Recovery Forbidden By The *Illinois Brick* Rule Because The Direct Purchasers Are Suing In Another Court To Recover The Entire Alleged Overcharge

Petitioners say that *Illinois Brick* should not be applied here because "* * * there is no other purchaser with even the theoretical power to bring suit and enforce the antitrust laws * * *." Petition at 25. That is not true. There is now pending in the Eastern District of Pennsylvania a treble-damage action brought against respondents on behalf of a nationwide class of

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11. As noted above, the Ninth Circuit declined on jurisdictional grounds to consider the existence and possible scope of any "control" exception to *Illinois Brick*, holding only that proof of such an exception in these cases, if available, would require dealer-by-dealer evidence, precluding class certification. *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1343 (9th Cir. 1982); Petition at A-20 to 21.

the dealers who purchase gasoline directly. The class has been certified under Fed. R. Civ. P. 23. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The *Bogosian* plaintiffs contend, *inter alia*, that dealers are "captives" who by reason of an alleged antitrust violation have been deprived of the benefit of interbrand competition in the wholesale gasoline market. The class has been certified on the theory that the injury, if any, caused by this alleged restraint is an overcharge on respondents' wholesale sales of gasoline to the plaintiff dealers. *Id.* at 455. The wholesale restraint alleged in *Bogosian* is indistinguishable from the "no intervening market" allegations which petitioners offer as reasons for ignoring *Illinois Brick*. *E.g.*, Petition at 16.

The Third Circuit, applying the *Hanover Shoe* rule, has forbidden respondents from attempting to prove in *Bogosian* that the dealers passed on the alleged overcharge to indirect purchasers such as the present petitioners. 561 F.2d at 456. Therefore, the courts below properly concluded that plaintiffs' indirect-purchase claims starkly presented the potential for double recovery which this Court found unacceptable in *Illinois Brick*. Thus, defendants could be forced to pay treble damages twice on the same gallon of gasoline: once in *Bogosian* to the dealer who bought it from a defendant, and again in these cases to the indirect purchaser who bought it from the dealer. *Illinois Brick* established a bright-line rule to solve this problem. The direct purchaser may sue, and the indirect purchaser may not. That rule has been followed here.[12]

The pendency of a nationwide direct-purchaser class action in *Bogosian*, coupled with petitioners' admission that direct-purchaser dealers bring antitrust suits against oil companies all the time, Petition at 15, fully rebuts petitioners' argument that application of the *Illinois Brick* rule immunizes this industry

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12. Petitioners appear to claim that dealers cannot sue to recover overcharges if they passed such overcharges on to their retail customers. Petition at 19. That assertion is simply wrong under *Hanover Shoe*.

from antitrust enforcement.[13] It also rebuts petitioners' suggestion that application of *Illinois Brick* to this industry will lead other manufacturers "* * * to insert captive middlemen * * *" between themselves and ultimate consumers. Petition at 20. In this industry the middlemen, far from being docile "captives," are suing.

4. The Decisions Below Have Avoided The Need For The Complex, Speculative Proof Rejected By This Court In *Illinois Brick*

Petitioners say that application of *Illinois Brick* to bar their indirect-purchase claims has made these actions "* * * markedly more complex * * *," thereby purportedly frustrating this Court's second rationale for the *Illinois Brick* rule. Petition at 25. To the contrary, the lower courts have saved these actions from precisely the complexity that *Illinois Brick* was designed to avoid. Petitioners sought to prove that thousands of retail dealers competing in hundreds of different local markets passed on alleged wholesale overcharges in setting their retail prices, under circumstances where both wholesale and retail prices fluctuated constantly and where there was no set relationship between such prices. Clearly, such proof could not even be attempted without resort to "massive evidence and complex theories" forbidden by this Court's decisions in *Hanover Shoe* and *Illinois Brick*. 392 U.S. at 493; 431 U.S. at 741.

13. Petitioners cite an unpublished doctoral dissertation which they say shows by "empirical study" that the *Illinois Brick* rule does not work. Petition at 14 n.4. The purported empirical study, however, was nothing more than a survey of state attorneys general, including counsel for these petitioners. V. Sarris, The Efficiency of Private Antitrust Enforcement: The *Illinois Brick* Decision and Its Implications, 196-97 (May 1979) (available through University Microfilms International). The author, citing reliance on a survey of petitioners' counsel by a written questionnaire and follow-up telephone interviews, states that direct purchasers in the petroleum products market have not sued their suppliers, before or after *Illinois Brick*, because of their "[f]inancial dependence" on their suppliers and the possibility of "* * * lease termination." *Id.* at 205. *Bogosian* is not cited in this dissertation.

B. There Is No Conflict Among The Lower Courts That This Court Needs To Resolve

Petitioners affirmatively disclaim any argument that a conflict among the courts of appeals warrants the granting of the writ. Petition at 23.

Petitioners say that there is a conflict between the application of *Illinois Brick* in these cases and the unreviewed decision of a district court in another circuit, *Soskel v. Texaco, Inc.*, 514 F. Supp. 578 (S.D.N.Y. 1981). Assuming *arguendo* that the decisions are in conflict,[14] there is, as Mr. Justice Harlan long ago noted, no basis for granting certiorari on "conflict" grounds until the relevant court of appeals—the Second Circuit in this instance—has considered this issue.[15] Harlan, *Manning the Dikes*, 13 Rec. A.B. City N.Y. 541, 552 (1958).

Indeed, far from being the subject of a conflict, the fundamental proposition challenged by the petition—that *Illinois Brick* bars claims by indirect purchasers in the absence of a specific exception—has been followed in a variety of factual contexts by every circuit court that has had occasion to consider it.[16]

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14. *Soskel* arose under federal price control regulations, and did not involve any claim under the antitrust laws. Its discussion of the *Illinois Brick* rule therefore is *dictum*.

15. Plaintiffs cite *Massachusetts v. United States*, 435 U.S. 444 (1978), in which the Court granted certiorari to resolve a conflict between a court of appeals and a district court. Petition at 24. But the district court decision at issue in that case was the equivalent of a decision by a court of appeals because it was subject to direct review in this Court and an appeal had in fact been docketed. 435 U.S. at 453. *Soskel* was not such a case.

16. *See, e.g., In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 496 n.2 (3d Cir. 1982); *Alaska v. Chevron Chem. Co.*, 669 F.2d 1299, 1301 & n.2 (9th Cir. 1982); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 639-43 (5th Cir. 1982), *cert. granted on other grounds sub nom. Weyerhauser Corp. v. Lyman Lamb Co.*, 456 U.S. 971 (1982); *Zinser v. Continental Grain Co.*, 660 F.2d 754, 759-62 (10th Cir. 1981), *cert. denied sub nom. Zinser v. Palmby*, 455 U.S. 941 (1982); *Royal Printing Co. v. Kim-*

C. The Ninth Circuit's Disposition Of The Three Certified Interlocutory Rulings Before It Is Not Addressed By The Petition And Provides No Basis For Certiorari In Any Event

The petition implies that the Court is being asked to review all of the Ninth Circuit's rulings. Petition at 7. But the petition's statement of questions presented (indeed, the petition as a whole) is addressed only to the application of *Illinois Brick* to petitioners' indirect purchase claims, and not to the Ninth Circuit's disposition of the three certified interlocutory rulings described at pages 3-5, above. Those rulings therefore are not properly presented for the Court's review under Supreme Court Rule 21.1. Moreover, even if the petitioners' implied request for review of those rulings is considered, such review should not be granted because the rulings themselves are unworthy of certiorari.

1. The "Vertical Conspiracy" And "Umbrella" Holdings Are Not Worthy Of Certiorari

The petition never explains why the discretionary writ of certiorari should issue to bring before this Court the "vertical conspiracy" and "umbrella" holdings described at pages 3-4, above. Thus, the statement of questions presented, which under Supreme Court Rule 21.1(a) defines the scope of what this Court is asked to review, is wholly devoted to the "retail price fixing" theory by which petitioners seek to evade *Illinois Brick*. That theory does not "fairly include" the Ninth Circuit's holding that alleged vertical conspirators must be joined as defendants because acceptance of the petition's arguments would relieve the plaintiffs of any need to plead a vertical conspiracy. The "retail price fixing" theory is also irrelevant to petitioners' "umbrella" claims because the prices charged by an "umbrella" seller by definition are not set by *any* conspiracy. *See In re Coordinated Pretrial Proceedings in Petro-*

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berly-Clark Corp., 621 F.2d 323 (9th Cir. 1980); *Jewish Hosp. Ass'n v. Stewart Mechanical Enter., Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1152, 1156-66 (5th Cir. 1979), *cert. denied sub nom. Safeway Stores, Inc. v. Meat Price Investigators*, 449 U.S. 905 (1980).

leum Products Antitrust Litigation, 691 F.2d 1335, 1338-39 (9th Cir. 1982); Petition at A-5 to 6.

The "vertical conspiracy" and "umbrella" rulings are in any event unworthy of certiorari. The "vertical conspiracy" ruling merely prevents an obvious potential for duplicative recovery if indirect purchasers are allowed to sue without bringing the direct purchaser into the action and binding him to its result.[17] Two circuit courts in addition to the Ninth Circuit have expressed concern that indirect purchasers might seek to plead their way around the *Illinois Brick* rule with boilerplate allegations of vertical conspiracy. The Fifth Circuit, in order to prevent such misuse of vertical conspiracy theories, established the rule of mandatory joinder that was followed by the lower courts in these cases. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied sub nom. Safeway Stores, Inc. v. Meat Price Investigators Association*, 449 U.S. 905 (1980); *see also Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 977 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981).[18] No circuit court has held to the contrary.

The dismissal of "umbrella" claims is equally unworthy of review by certiorari. The Ninth Circuit's ruling is based on two fundamental grounds. First, the Ninth Circuit was not prepared to permit the complex, speculative economic evidence that would be necessary to attempt to establish that the non-conspiring "umbrella" seller set his prices at the level he did because of the alleged conspiracy rather than his own independent business judgment. *In re Coordinated Pretrial*

17. Because the petitioners have never amended their complaints to allege vertical conspiracy, the Ninth Circuit expressed reservations about whether the district court's joinder requirement was ripe for appellate review even in that court. 691 F.2d at 1341 n.9; Petition at A-16 n.9. In the absence of such amendment, it certainly is not ripe for review by certiorari here.

18. The Sixth Circuit in *Jewish Hospital* agreed with the Fifth Circuit's *Beef* analysis but had no need to apply a mandatory-joinder rule because the *Jewish Hospital* plaintiff had failed to plead vertical conspiracy or any fact from which vertical conspiracy could have been inferred. 628 F.2d at 977.

Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d, 1335, 1340-41; Petition at A-13. Second, the Ninth Circuit found that, given the multi-tiered layers of distribution in the petroleum industry, petitioners' "umbrella" claims rested on "pass-on" theories squarely prohibited by the holding of *Illinois Brick*. *Id.* at 1340; Petition at A-12 to 13. The Ninth Circuit's analysis is thoroughly consistent with *Illinois Brick*'s rejection of economic evidence about the supposed effects of a conspiracy upon the resale pricing decisions of middlemen. 431 U.S. at 741-43. Indeed, it is also consistent with this Court's recent holding that "* * * the tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury * * * and the existence of more direct victims of the alleged conspiracy * * *" weigh heavily against granting antitrust standing to a particular plaintiff. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, ____ U.S. ____, 103 S. Ct. 897, 913 (1983). *See also id.* at 903 n.14, 910 n.46 (rejecting antitrust claim where alleged injury stems from conduct of persons who were neither members nor victims of alleged conspiracy).

2. The Ninth Circuit's Affirmance Of The Denial Of Class Certification Provides No Ground For Review By Certiorari

Petitioners asked the district court to certify under Rule 23 plaintiff classes of consumers in the five plaintiff states. Those classes include millions of people (Petition at 22) who bought gasoline as indirect purchasers from some 35,000 different retail dealers. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982); Petition at A-19. As discussed above, the district court denied certification on the ground that such consumers' claims were barred by *Illinois Brick* or would require dealer-by-dealer proof of a purported "control" exception or vertical conspiracy. The Ninth Circuit affirmed. See pp. 4-5, above.

Petitioners never attempt to explain why the Court should review the denial of class certification. And there is clearly no occasion for the Court to do so. District court decisions on Rule 23 class certification are inherently discretionary. Thus,

when this Court decided that consumers have standing to bring treble damage claims, it also urged the district courts to "* * * exercise sound discretion and use the tools available" in order to avoid "* * * class-action harassment * * *." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).[19] Here, a district court that has lived with a massive litigation for five years has exercised its discretion to deny certification. It concluded from an abundant factual record that the proposed consumer classes do not satisfy the requirement of Rule 23(b)(3) that common issues predominate. A court of appeals has unanimously affirmed. Plainly, there is no need for this Court to exercise its discretionary jurisdiction.

Moreover, the principle that controlled the denial of class certification in this case is particularly unworthy of review by certiorari. The lower courts held that proof of vertical conspiracy or a purported "control" exception to *Illinois Brick* would be an individual question for each of the 35,000 dealers from whom the putative class members bought. The rule that a supplier's control over his customer's resale price, whether by agreement or coercion, is an individual question for each dealer is not novel or unsettled. That rule has been applied routinely by lower courts in decisions denying class certification for years.[20] Certiorari should not be granted to review a case following such a cut-and-dried line of authority, especially where that authority is so clearly consistent with the Court's instructions in *Reiter, supra*.

19. As the Court noted in *Reiter*:

> "District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions." 442 U.S. at 345.

20. *Chicken Delight, Inc. v. Harris*, 412 F.2d 830, 831 (9th Cir. 1969); *Mekani v. Miller Brewing Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,563 (E.D. Mich. 1982); *Kendler v. Federated Dep't Stores, Inc.*, 88 F.R.D. 688, 692-93 (S.D.N.Y. 1981); *Abrams v. Interco, Inc.*, 1981-2 Trade Cas. (CCH) ¶ 64,295 (S.D.N.Y. 1981); *Colburn v. Roto-Rooter Corp.*, 78 F.R.D. 679, 682-83 (N.D. Cal. 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 122 (N.D. Cal. 1978); *Perry v. Amerada*

CONCLUSION

For the reasons set forth above, respondents respectfully request that the petition for a writ of certiorari be denied in all respects.

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Respectfully submitted,

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Atlantic Richfield Company

Acerlan, S.A.
Alyeska Pipeline Service Company
Anaconda-Ericsson Inc.
Anamax Mining Company
Arilan, S.A. de C.V.
Atlantic Richfield de Mexico, S.A. de C.V.
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Centroamericana de Cobre, S.A.
Cobre de Hercules, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas, S.A. de C.V.
Compania Minera Kappa, S.A.
Compania Minera Penacobre, S.A.
Cook Inlet Pipe Line Company
Cupro San Luis, S.A. de C.V.
Delaware Bay Transportation Company
Dexter de Mexico, S.A.
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Energy Transportation Systems, Inc.
Fip, S.A.
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Griffith-Consumers Company
Hardy Oil Company
Hydrokem Performance Chemicals Company
Imperial Eastman de Mexico, S.A.

Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industrias Tecnos, S.A. de C.V.
Inval, S.A.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Lingobronce, S.A.
Magnaval, S.A.
Manguera Flex, S.A. de C.V.
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Mayflower Mining Company
R. W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica
Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
P. T. Arutmin Indonesia
Panaval, S.A.
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Patten Mining Company
Platte Pipe Line Company
Productos Especiales Metalicos, S.A.
Servicios Industriales Nacobre, S.A.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Solvamex, S.A. de C.V.
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

Cities Service Company

Cit-Con Oil Corporation
Coltexo Corporation
Badger Pipe Line Company
Calcasieu Chemical Corporation
Canyon Reef Carriers, Inc.
Clean Seas, Inc.
Colonial Pipeline Company
Corpus Christi Area Oil Spill Control Association
Cynthia Gas Gathering Company Limited
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Everglades Pipe Line Company
Explorer Pipeline Company
Kaw Pipe Line Company
Key Pipe Line Co. Ltd.
Northward Developments Ltd.
Occidental Petroleum Corporation
Petrogas Processing Limited
Seadock, Inc.
Texas-New Mexico Pipe Line Company
West Shore Pipe Line Company
West Texas Gulf Pipe Line Company
Wolverine Pipe Line Company

Exxon Corporation

Exxon Pipeline Company
Imperial Oil Limited
Reliance Electric Company

Gulf Oil Corporation

A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Allied - General Nuclear Services
Andogas S.A. (Switzerland)
Asia Polymer Corp.
Autobahn-Raststaette Wuerenlos AG
China Gulf Oil Company Limited
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Emery Joint Venture
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
Forenade Svenska Oljeimportorers AB
Gulf Canada Limited
Guif Oil Canada Limited Associated Companies
Gulf Oil Corporation Erisa
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Zaire S.A.R.L.
Harshaw - Byrce & Co. Pty. Ltd.
Harshaw - Juarez S.A. de C.V.
Harshaw - Murata Kabushiki Kaisha
Harshaw Galvanotecnia S.A.
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GmbH
Insco Holding & Finance Company N.V.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipe Line Company
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation

North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pol Transport AB
Pyropower Corporation
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A. - Refining
Solvent Refined Coal International, Inc.
Solvo Finanzierungs-Und Beteiligungs AG
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemical Corporation
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

Mobil Oil Corporation

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co. KG
Akauma Rekisei Kogyo Kabushiki Kaisha

Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn Gmb
The Associat el Company Limited
Associated Oc. mpany (Plant) Limited
ATAS-Anadolu T hanesi Anonim Sirketi
Atlas Sahara S..
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation

Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S. A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructura Calle 67, Limitada
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S. A.
C.R.C. Lyon Chauffage

CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
De. Ba. Deposito di Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Ets. R. Saillard
Etablissements Wagner
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.

Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Inmunizadoras Unidas, S. A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Istanbul Petrol ve Makine Yasglari Limited Sirketi

Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kyguns Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil Comercio, Industria e Servicos Ltda.
Mobil Corporation
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company

Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobil Tunisie
Mobilrex
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.

Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.

Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S. A. Ets. George DUBOIS
S. A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi, Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agricole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Alfred Ott & Cie
Societe Anonyme Etablissments Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."

Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Establissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Jean Roussel S. A.

Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Kohn-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers

Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft mbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

Phillips Petroleum Company

Aero Oil Company
Acurex Corporation
Alyeska Pipeline Service Company
Bruin Carbon Dioxide Sales Corporation
Canyon Reef Carriers Inc.
Chisholm Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Kaw Pipe Line Company
Kenai LNG Corporation
LeeFac, Inc.
Papago Chemicals, Inc.
Phillips Gas Supply Corporation
Phillips Pacific Chemical Company

Phillips Petroleum Credit Corporation
Powder River Corporation
Salk Institute Biotechnology/Industrial Assoc. Inc.
Seadock, Inc.
Seaway Pipeline, Inc.
Stockton, Whatley, Davin
Texas Offshore Port, Inc.
Transatlantic Reinsurance
White River Shale Oil Corporation
Arctic LNG Transportation Company
Bonny LNG Ltd.
Calatrava Empresa Para la Industria Petroquimica, S.A.
Canada Western Cordage Co., Ltd.
Cochin Refineries Ltd.
Compagnie Francaise du Carbon Black S.A.
Drisco S.A. de C.U.
Insurance and Reinsurance Brokers Ltd.
Iranian Marine International Oil Co.
Negromex S.A.
Nordisk Philback AB
Norland GmbH
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Petrochim
Phillips Carbon Black Co. (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Imperial Petroleum Limited
Phillips Petroleum Singapore Chemicals (Private) Limited
Philmac Oils Limited
Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Quimica Veneco C.A.
Renolit Fertighaus GmbH
Sevalco (Holdings) Limited

SPODCO Ltd.
Venezoil, C.A.
Walton Insurance Ltd.
Western Desert Operating Petroleum Co.

Shell Oil Company

Basin Pipe Line System
Bullenbay Marine Services, N.V.
Business Development Corporation of North Carolina
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Cortez Capital Corporation
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
First Harlem Securities Corporation
Fractionation Research, Inc.
George Newman & Company
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Ltd.
Olympic Pipe Line Company
Ozark Pipe Line Company
Penn Central Corporation
Plantation Pipe Line Company
Rancho Pipe Line System
Royal Dutch Petroleum Company
Seadock, Inc.
Shell Petroleum, N.V.

The "Shell" Transport and Trading Company, Limited
Ship Shoal Pipe Line System
Thums Long Beach Company
United Scientific, Inc.
West Shore Pipe Line Company
WIDC
Wolverine Pipe Line Company

Standard Oil Company of California

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.
American Overseas Petroleum Limited
Chevron do Brasil Participacoes e Empreendimentos Ltda.
Chevron Oil Company of Portugal
Compania de Niguel Colombiano, S.A.
Compania de Petroleo Chevron S.A.
Crest Exploration Limited
Oil Insurance Limited
P. T. Caltex Pacific Indonesia
Refineria Petrolera de Guatemala-California, Inc.
Windfarms, Ltd.
Caltex Petroleum Corporation

Standard Oil Company (Indiana)

Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corp.
Amoco Oil Holdings, S.A.
Analog Devices, Inc.
Cetus Corp.
Chicago Bank of Commerce
Cyprus Mines Corp.
Amoco (U.K.) Exploration Company
Amoco Australia Ltd.
Solarex Corp.

Sun Company, Inc.

Alaska Bulk Carriers, Inc.
Alberson Pipeline Ltd.
Alberta Gas Trunk Line Company Ltd.
Allegheny Power
Appalachian Power
Athabasca Realty Company Limited
AT&T
Barclay Inn Associates
Baron Petroleums Inc.
Becton, Dickinson and Company
Blackfeet Indian Writing Company, Inc.
Canyon Reef Carriers, Inc.
Carboline Coatings Ltd.
Carboline Europe
Carboline S.A. De C.V.
Carboline South East Asia Ltd.
Carboline-Ferro Powder Coatings Company
Carnduff Gas Limited
Carolina Power & Light
Chemson Inc.
Christy Chrysler Plymouth, Inc.
Cleveland Electric Illumination
Corporate Securities Trust
Deepsea Ventures, Inc.
Detroit Edison
Duke Power
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Fairland Village
Fessey Property
Fourth Thunderbird Stations, Inc.
General Telephone - Cal.
Glacier Bay Transportation Corporation
Gow Fuels Inc.
Hearthstone
Hemisphere Oil Company, Inc.
Horry Telephone Cooperative, Inc.

Indian Springs
Industries for Tulsa, Inc.
Inland Corporation
International Biomedical Instruments, Inc.
Japan Carboline Company
Japan Sun Oil Company, Ltd.
Langford Farms
Lavan Petroleum Company (LAPCO)
Liberian International American
Lugrasa, S.A.
Malt/Radnor Venture
Malt/Radnor Venture #2
Maywelle Properties Ltd.
Mid-Valley Pipeline Company
Muskoka Oil Company Limited
National Railway Utilization Corporation
Niagra Mohawk Purchase
Nottingham Gas Limited
Nuestro Publications, Inc.
Ohio Edison
Oil Insurance Limited
Oklahoma Business Development Co.
Olney Oaks
Ouimet-Gobeille Inc.
Parc De Langlade
Parkway Trade Center
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pennsylvania Power & Light
Petromech Sdn. Bhd.
Philadelphia Electric
Progress Venture Capitol Corp.
Public Service Electric and Gas
Radnor/Barge Partnership
Radnor/Birmingham Properties
Radnor/Bouma Partnership
Radnor/Brown Street Partnership
Radnor/Island Company

Radnor/Jam Company
Radnor/Laguna Hills Partnership
Radnor/Livonia Partnership
Radnor/Meadowland Partnership
Radnor/Oceana Partnership
Radnor/Oceana South Partnership
Radnor/Owchlan Partnership
Redwater Water Disposal Company Limited
River Oaks Associates
Seabrook Place
Second Thunderbird Stations, Inc.
SMS Petroleum Ltd.
Solartech Limited
Solcar Properties, Inc.
South Carolina Electric and Gas
Southeastern Pa. Development Fund
Southern Company
Star Carboline
Sugarland Business Park
Sultran Ltd.
Sun Exploration Division
    Sun Exploration and Production Company
Sun Explorations of Quebec Ltd.
Sun Gas Division
    Sun Exploration and Production Company
Sun Hydroponics Limited
Sun International Limited
Sun Oil Company of Canada Limited
Sun Production Division
    Sun Exploration and Production Company
Sun-Canadian Pipe Line Company Limited
Sunchem (U.K.) Limited
Sunchem Inc.
Sunchem Shipping Inc.
Suncor Inc.
Suncor Supply Limited
Sunoco De Chile Ltda.
Sunoco Home Comfort Inc.

Sunoco Inc.
Sunoco Overseas Limited
Sunolin Chemical Company
Sunray Nigeria Oil Company Unlimited
Taranaki Blast Services Ltd.
Texoma Pipe Line Company
The VLM Corporation
Third Thunderbird Stations, Inc.
Thunderbird Stations, Inc.
Timber Trail
Totem Resources Corporation
Tretol Ltd.
Trillium Exploration Corporation
Turtle Bay
Van Salt Water Disposal Company
Venezoil C.A.
Vessy Chemicals Pty. Ltd.
Virginia Electric Power
Warbonnet Company
West Texas Gulf Pipe Line Company
White River Shale Oil Corporation
Wisconsin Power & Light
Zion Investment Associates, Inc.

Texaco Inc.

Refineria Texaco de Honduras, S.A.
Texaco Agro-Industrial (Nigeria) Limited
Quimica Industrial "FIDES" S.A.
Texaco Canada Inc.
Public Fuel Transmission Systems Limited
Great Eastern Oil & Import Co. Limited, The
Texaco Norway A/S
Deutsche Texaco Aktiengesellschaft
Texaco Portugal Prospeccao e Producao, S.A.R.L.
Texaco Exploration Norway A/S
Texaco Gabon
Texaco Togo
Zaire-Texaco S.A.R.L.

Texaco Nigeria Limited
Texaco-Cities Service Pipe Line Company
Tadlaqaz S.A.
American Overseas Petroleum Limited
Bunkerservice Brunsbuttel GmbH
Societe Ivoirienne De Futs et D'Emballages (SIFEMBAL)
Societe Guineenne De Lubrifiants et D'Emballages (SOGUILUBE)
Caltex Petroleum Corporation
Australian Lubricanting Oil Refinery Limited
Phoenicia Oil Company S.A.L.
Sydney Metropolitan Pipeline Pty. Limited
Koa Oil Company, Limited
Mediterranean Refining Company
Nippon Petroleum Refining Company, Ltd.
Tokyo Tanker Company, Limited
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Condea Chemie GmbH
Federated Pipe Lines Ltd.
Flexibox GmbH
LPG de Panama, S.A.
Pembroke Capital Company Inc.
P.T. Caltex Pacific Indonesia
Petrogas, S.A.
Texaco Maroc
Societe Ivoirienne D'Avitaillements Portuaires (S.I.A.P.)
Bonafides Grundstueksverwaltunggesellschaft mbH & Co. Vermietungs KG
Bayswater Nominees Pty. Ltd.
Hunter Pipeline
Majik Markets
Caltex Australia Limited
Ful-Tex Euro Services Inc.
West Australian Petroleum Pty. Limited
Honam Oil Refinery Company, Limited
Korea Tanker Company Limited
Societe Ivoirienne D'Entrepasage De Produits Petroliers (S.I.E.P.P.)

Texaco Ghana Limited
Mamafil Limited
CandT Orient Inc.
Badger Pipe Line Company
Bayonne Industries, Inc.
Canyon Reef Carriers, Inc.
Colonial Pipeline Company
Coltexo Corporation
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Olympic Pipe Line Company
Portland Pipe Line Corporation
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Aircraft Fuel Supply B.V.
Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Boral Limited
New Zealand Refining Company Limited, The
South Africa Oil Refinery (Proprietary) Ltd.
Batangas Land Company Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Central African Petroleum Refineries (Private) Ltd.
East African Oil Refineries Limited
H. C. Sleigh Limited
Pakistan Refinery Limited

Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)
Deutsche Transalpine Olleitung GmbH
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.
Ghana Bunkering Services Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Maghreb Gaz S.A.
Mainline Pipelines Limited
Milan Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co., Ltd.
Montreal Pipe Line Company Limited
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberheinische Mineralolwerke G.m.b.H.
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Raffinerie du Sud-Ouest S.A.
Rheem del Ecuador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft mbH
Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe D'Entreposage de Bobo-Dioulasso (SEB)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEP-BURUNDI)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe Gabonaise de Raffinage (SOGARA)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)

Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A. de C.V.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur-Betankungsanlage A.G. (UBAG)
West Australian Natural Gas Pty. Limited
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)
Aktiebolaget Djurgardsberg
Association Petroliere Belge
Aviation Fueling Services, S.A.
Aviation Service Center
Compagnie d'Entreposage Communautaire
Singapore Refining Company Private Limited
Societe Belge de Transport Par Pipeline S.A.
Svensk Petroleumadministration AB
Total Centrafricaine de Gestion
Societe Agricole des Entreprises Petrolieres
Union des Raffineurs Belges
Svensk Petroleumlagring Tre Aktienbolag
Societe Camerounaise des Depots Petroleirs (SCDP)
Trans-Northern Pipelines Inc./Pipelines Trans-Nord Inc.
Bergemann KG
Drapol International Limited
Bahrain National Gas Company (B.S.C.)
Farmer Construction Limited
Nippon Oil Staging Terminal Company, Limited
Newcastle Pipeline
Motorway Services Ltd.
Mdina Weave Ltd.

Union Oil Company of California

Ace Gas, Incorporated
Adobe Canyon Corporation
Alyeska Pipeline Service Company
Anchor Enterprises, Inc.
Badger Pipe Line Company
Brea Agricultural Service, Inc.
Business Development Corporation of North Carolina
Business Development Corporation of South Carolina
California Domestic Water Company
Calgary Winter Club
Canyon Meadows Golf & Country Club
Canyon Reef Carriers
Canselux Limited
Carnduff Gas Ltd.
Chemcentral Corporation
Chicap Pipe Line Company
Clean Bay, Inc.
Colonial Pipeline Company
Companhia Brasileira De Metalurgia E Mineracao
Cook Inlet Pipe Line Company
Cymoly Corporation
Darfield Industries, Inc.
Deerfield Farmers Telephone Company
East Texas Salt Water Disposal Company
Economic Development Corporation of Great Falls
Everglades Pipe Line Company
Greater Muskegon Industrial Fund, Inc.
Gravcap, Inc.
Gravity Adjustment, Inc.
Hancock Trucking, Inc.
Indonesia Enterprises, Inc.
Indonesia Petroleum Club
Inland Corporation
International Speedway Corporation
Kaneb Services, Inc.
Kyung In Energy Company, Ltd.

Los Angeles Oil Company, The
Maitland
Miami Valley Corporation
Mid-County Chemical Co.
Minneapolis Chamber of Commerce
National Corporation for Housing Partnerships
Ninian Pipeline Systems
Nottingham Gas Ltd.
Nova
Oil Shippers Service, Inc.
O.I.L. Insurance Ltd.
P-M-S West, Inc.
Peace Pipe Line Co.
Pembalta Gas System No. 1 Ltd.
Petrogas Processing Ltd.
Petroleum Club of Houston
Philippine Long Distance Telephone Company
Platte Pipe Line Company
Quebec Columbium, Ltd.
Redwater Disposal Co.
Sam Bo Real Estate Company, Ltd.
Sepulveda Oil & Gas Company
South Saskatchewan Pipe Line Company
Southcap Pipe Line Company
Southern California Petroleum
Sultran Limited
Superior Deshler Co.
Tecumseh Pipe Line Company
Terminales Maracaibo C.A.
THUMS Long Beach Company
United Dealers of Seattle
United Dealers of Tacoma
UNOCAL Corporation
UNOCO (Philippines), Inc.
USZ Associates
USZ Hotel Venture
Van Salt Water Disposal Company
West Shore Pipe Line Company

West Texas Gulf Pipe Line Company
William Bros. Pipeline Company
Wolverine Pipe Line Company
Yellowstone Pipe Line Company

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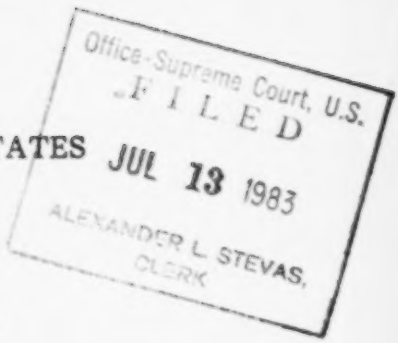

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

Plaintiffs file this brief reply to correct several serious mischaracterizations that underpin defendants' Brief in Opposition (BIO). At one point, defendants recast plaintiffs' allegation of a horizontal retail price-fixing conspiracy into an allegation of horizontal wholesale price-fixing. (BIO at pp. 8-11) They do so with the obvious intention of making this action appear to

be what it is not: another Illinois Brick Co. v. Illinois (1977) 431 U.S. 720. At another juncture, defendants recast plaintiffs' allegations of horizontal price-fixing into a curious form of vertical restraint, a "coercive exclusive-dealing arrangement." (BIO at pp. 9-10.) They do this because they want the present action to resemble Bogosian v. Gulf Oil Corp. (3d Cir. 1977) 561 F.2d 434, cert den. (1978) 434 U.S. 1083, which concerns nothing more than tying, id. at 439, and because class certification is more problematical when a vertical conspiracy is alleged. BIO at pp. 19-20, fn. 20.

In the face of such irresponsible misrepresentations, plaintiffs will once again briefly state their allegations, as they have been borne out by discovery. Defendants horizontally agreed to raise retail prices. Unlike the Illinois Brick defendants, defendants here did not fix wholesale prices to dealers because, unlike the Illinois Brick defendants, they did not compete at wholesale. Under the terms of their contracts with their branded dealers, defendants could and did change the price of gasoline to dealers at will — even after the gasoline was delivered. There

was no wholesale market to give dealers the option of buying their gasoline elsewhere — they could either accept defendants' prices or break their leases and leave their stations. Each defendant sold branded gasoline only through its own dealers, and each branded dealer obtained gasoline only from its own franchisor. A wholesale market restrained by wholesale price-fixing, the crucial element of Illinois Brick, simply does not exist in the present action.

The purpose of price-fixing is the avoidance of price competition. In the consumer petroleum industry, price competition for branded gasoline occurred solely at the retail level. Therefore, the wholesale level price-fix, which plaintiffs do not allege but to which defendants repeatedly allude, is a complete non sequitur.

Thus, defendants' repeated assertion that the Bogosian litigation is the direct purchaser analogue of MDL-150 is completely hollow. The Bogosian plaintiffs allege that defendants tie their gasoline to their station leases, and that all defendants do so because of some form of interdependent conscious parallelism. Bogosian v. Gulf Oil Corp., supra,

(3d Cir. 1977) 561 F.2d at 439. Regardless of whether the Bogosian plaintiffs prevail, that action obviously does nothing to challenge defendants for what plaintiffs here allege: a horizontal agreement on the retail prices to be paid by consumers. Neither before nor after Illinois Brick has there been any suggestion in the law that an antitrust action by one set of plaintiffs under one theory invalidates an action against the same defendants by different plaintiffs under a different theory.

More generally, the question here is not whether a dealer could sue defendants—anyone with the filing fee can bring an action in federal court. The question is who between captive dealers and retail consumers can sue for the horizontal fixing of retail prices. Logic suggests, and Associated General Contractors of California v. California State Council of Carpenters (1983) __ U.S. __, 103 S.Ct. 897, makes explicit, that dealers cannot recover for the overcharges of a retail price-fix because they are not consumers in the affected market. Id., at 909.

Nobody else has sued defendants for the conspiracy plaintiffs have uncovered, and nobody else can. Defendants face absolutely no threat of double exaction if plaintiffs are allowed to recover. A denial of plaintiffs' claim, however, grants defendants complete immunity from liability for the most blatant horizontal price-fixing.

The question can be presented in stark factual terms. Representatives of defendant oil companies periodically communicated to one another their intention to "restore" retail prices from competitive levels to "normal" levels. Rather than awaiting the interplay of market forces when they changed prices, defendants confirmed retail price increases with one another to be certain that competition would not defeat a price increase. Shortly thereafter, the retail prices at defendants' branded stations over broad geographic regions simultaneously jumped to their maximum ("normal") level. Plaintiffs urge that the consumers who paid these retail prices should recover. The courts below ruled that retail consumers cannot recover. Since there is not even a theoretical basis for dealer recovery (in

particular, the Bogosian plaintiffs do not begin to allege these facts), plaintiffs have brought this petition to question whether such behavior should be deemed outside the ambit of antitrust enforcement.

Defendants strongly urge, as they successfully did below, that the easiest course is to assume that Illinois Brick can be mechanically applied to any fact situation without an appraisal of the decision's underlying purposes. While this suggestion may chart the simplest course, it substitutes empty formalism for justice. Defendants have illegally exacted millions if not billions of dollars from millions of consumers and now baldly ask this Court to turn its back on the conspiracy's direct victims. Plaintiffs submit that

this Court's intervention is required to make certain that Illinois Brick will strengthen, not destroy, antitrust enforcement.

DATED: July 12, 1983

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No. 82-1938

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), bars Sherman Act claims of retail purchasers against refiners that sold through intermediary dealers when the retail purchasers contend that the refiners agreed to raise retail prices and that no wholesale market exists.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Between 1973 and 1977, petitioners—the States of California, Arizona, Oregon, Washington, and Florida—filed separate actions against respondents—16 oil companies—alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[1] Peti-

[1] The separate actions were transferred to the Central District of California for coordinated pretrial proceedings (Pet. App. A2).

tioners contend, inter alia, that respondents conspired to fix the retail price of gasoline. Petitioners sought damages both for themselves and on behalf of their citizens as parens patriae, pursuant to 15 U.S.C. 15c (Pet. App. A2). Petitioners also sought "to represent classes of government entities and a consumer sub-class consisting of natural persons who" had purchased gasoline prior to September 30, 1976 (the date after which states were authorized to bring parens patriae actions) (*ibid.*).[2] Finally, petitioners sought to recover damages for purchases they had made from non-conspirators who allegedly were enabled to charge higher prices as a result of the price "umbrella" created by the alleged conspiracy (*id.* at A5-A6).

Following this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), respondents moved to dismiss portions of the complaints. Approximately 80% of the purchases at issue in this case were made through franchised dealers (Pet. App. A3). Respondents contended that petitioners are barred by *Illinois Brick* from recovering damages for overcharges in connection with these indirect purchases (*ibid.*).[3]

Petitioners denied that *Illinois Brick* barred an action by consumers against refiners when the latter had fixed the retail price of gasoline to consumers (as opposed to the wholesale price to dealers). Petitioners also pointed out that this Court had suggested that *Illinois Brick* would not bar claims by indirect purchasers in the case of cost-plus contracts or purchases from entities "owned or controlled by the wrongdoer." Petitioners contended that both of these exceptions apply to the consumer purchases at issue

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[2] See 15 U.S.C. 15c.

[3] Direct purchases from respondents are not at issue at this stage of the pretrial proceedings.

in this case. Finally, petitioners suggested that they might be able to prove a conspiracy between respondents and their franchised dealers and that proof of such a vertical conspiracy would not be barred by *Illinois Brick* (Pet. App. C23).[4]

2. The district court granted in part and denied in part respondents' motions to dismiss. The district court held, inter alia, that *Illinois Brick* would not bar petitioners' claims to the extent they could prove that their indirect purchases were made from sellers with whom respondents had cost-plus contracts or from "entities owned or controlled by the defendants or their co-conspirators" (Pet. App. C29). The district court reviewed decisions applying the "control" exception described in *Illinois Brick* and concluded (*id.* at C19-C20):

> On the basis of these decisions, this court is able to conclude that an indirect purchaser that purchases from an entity owned or controlled by the wrongdoer may sue to recover passed-on overcharges and is excepted from the general rule of *Illinois Brick*. The question of how much control is required to meet the exception cannot be decided until a factual record is developed. The degree of ownership, profit taking, or ability to set prices will be important considerations in determining whether the intermediate seller is "controlled."

The district court also held that petitioners could not recover damages from respondents under their "umbrella" theory (*id.* at C20-C23). Finally, the district court held that petitioners would be permitted to amend their complaints to allege vertical conspiracies

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[4] However, petitioners have never amended their complaints to assert such a claim.

between respondents and their franchised dealers only if they joined the latter as defendants, so that the dealers would be bound by a judicial determination of their status as co-conspirators, thus avoiding the possibility of double recoveries against respondents (*id.* at C23-C25).

In August 1980, the district court incorporated its conclusions into a revised order consisting of five numbered paragraphs (Pet. App. C28-C30). In paragraph Second of that order, the district court defined the circumstances under which it would permit petitioners to recover damages based on their contention that respondents had set or manipulated prices at the wholesale or retail levels (*id.* at C29):

> [Petitioners] will be allowed to seek damages only as to direct purchases from the [respondents], their co-conspirators, sellers with whom [petitioner] had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the [respondents] or their co-conspirators.

In paragraphs Third and Fourth of its order, the district court dismissed petitioners' umbrella pricing claims and granted them leave to amend their complaints to allege a retail price maintenance conspiracy on the condition that they join the retail dealers as defendants (*ibid.*).[5] On petitioners' motion, the district court certified paragraphs Third and Fourth of its order for interlocutory appeal, pursuant to 28 U.S.C. 1292(b) (Pet. App. A4). Petitioners did not ask the district court to certify paragraph Second of its order (*id.* at A4 n.1).

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[5] The remainder of the district court's order is not relevant to the issues presented in the petition for a writ of certiorari.

In September 1981, the district court denied petitioners' motion for certification of a class of retail gasoline purchasers (Pet. App. B1-B11). The court stated (*id.* at B4):

> The plaintiffs regularly have insisted that they can prove that the defendants, through horizontal conspiracy, established and controlled retail gasoline prices, that market forces thereby were superseded, and that dealer participation was insignificant. However, their explanations as to just how such control was exercised have been very general, somewhat vague, and occasionally inconsistent.

The court concluded that in view of the fact that there were thousands of retail dealers and the absence of convincing universal evidence of respondents' control over the dealers, any control or vertical agreement would have to be proved on a dealer-by-dealer basis, which would foreclose class certification under Fed. R. Civ. P. 23(b)(3). The court certified the class certification issue for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. B11).

3. The court of appeals consolidated the two interlocutory appeals and affirmed (Pet. App. A1-A23). The court of appeals agreed with the district court that damages under petitioners' "umbrella theory" would be too remote and speculative to be recoverable, citing *Illinois Brick* (Pet. App. A5-A15). The court of appeals also agreed that Fed. R. Civ. P. 19(a)(2)(ii) would require joinder of the retail dealers as defendants if petitioners amended their complaints to allege a vertical conspiracy (Pet. App. A16-A18). Finally, the court of appeals agreed with the district court that petitioners had not tendered sufficient evidence of respondents' control over their

franchised dealers to establish that respondents could be held liable to retail purchasers as a class (*id.* at A19-A22). However, the court of appeals noted that the question of whether the control exception noted in *Illinois Brick* would apply to the facts of this case would remain open for future development (*id.* at A20-A21):

> Without giving the district court an opportunity to pass on the issue, we are unwilling at this stage of the proceedings to pronounce the precise contours of the "control" exception to *Illinois Brick* or to decide whether or not it may have application to the facts of the case. We do conclude, however, that if such an exception is applicable, the degree to which the individual retail dealers may have exercised independent pricing discretion is imporant.

The court of appeals did not address the merits of paragraph Second of the district court's August 1980 order, because that paragraph had not been certified for interlocutory appeal. Pet. App. A4 n.1.

DISCUSSION

The interlocutory decision of the court of appeals rests largely on the peculiar facts and state of the evidence in this case. The decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the question raised by the petition for a writ of certiorari was not squarely addressed by the court of appeals. The court of appeals' decision may well have a significant effect on petitioners' ability to litigate a major portion of this case. However, we believe that, in its current interlocutory posture, the decision presents no clearly defined legal issue of sufficient general importance to warrant review by this Court.

The questions presented in the petition relate to the application of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to petitioners' claims. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-494 (1968), this Court held that a manufacturer of shoemaking machinery could not defend against a treble damages suit for overcharges on the ground that the plaintiff-purchaser, a shoe manufacturer, had passed on any excess costs of the shoemaking machinery by raising the prices of its shoes. In *Illinois Brick* the Court "decline[d] to construe § 4 [of the Clayton Act] to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers" (431 U.S. at 735). The Court noted, inter alia, that permitting damages actions by indirect purchasers would require trial courts to apportion an overcharge among all those who may have absorbed a portion of it, thus adding "whole new dimensions of complexity to treble-damages suits and seriously undermin[ing] their effectiveness" (*id.* at 737).

Petitioners contend (Pet. 9-10) that the *Hanover Shoe/Illinois Brick* rule should not bar their claims against respondent oil companies, despite the existence of an intermediate layer of retail dealers who purchase gasoline from respondents and sell it to the consumers whom petitioners seek to represent. Petitioners note that they are alleging a conspiracy to fix the retail prices themselves, rather than a conspiracy to fix wholesale prices accompanied by a pass-through of the wholesale overcharges to consumers; in addition, petitioners point out that they allege that there is no wholesale market in which the respondents compete because of their franchise relationship with the

branded dealers. Petitioners contend that this Court never intended the *Hanover Shoe/Illinois Brick* rule to apply to the sort of market that is the subject of this case. They acknowledge (Pet. 23) that there is no conflict among the circuits on this point.

The question that petitioners present to this Court is one that was not squarely decided by the court of appeals. The district court's basic ruling on the application of *Illinois Brick* to petitioners' allegations is contained in paragraph Second of its August 1980 order. Petitioners did not seek certification of this paragraph for interlocutory appeal; rather, they requested certification only of paragraphs Third and Fourth of the 1980 order, relating to their umbrella pricing theory and vertical conspiracy allegations. The district court later applied paragraph Second of the 1980 order in its 1981 order on class certification, which was certified to the court of appeals. The court of appeals could have chosen to review paragraph Second in connection with its review of the class certification order.[6] However, it expressly declined to do so because paragraph Second itself had not been certified (Pet. App. A4 n.1).[7] This Court normally does not review questions that were not decided by the court of appeals. See *United States* v. *Mitchell*, 445

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[6] *See Amoco Transport Co.* v. *Bugsier Reederei & Bergungs, A.G.*, 659 F.2d 789, 793 n.5 (7th Cir. 1981); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 994-995 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

[7] Despite its failure to review paragraph Second, the court of appeals cited *Illinois Brick* at a number of points in its opinion and appears to have assumed its application to this case. Both petitioners and respondents take the position that the court of appeals has decided the *Illinois Brick* issue implicitly. See Pet. 7; Br. in Opp. 5 & n.3.

U.S. 535, 546 n.7 (1980); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

In addition, the question petitioners present rests on factual assumptions rejected by the courts below. Both courts concluded that petitioners had failed to present adequate support at the class certification stage for their theory that respondents uniformly were able to fix prices at the retail level.[8] Petitioners do not expressly raise that conclusion as a question for this Court's review. Thus, petitioners' questions concerning application of *Illinois Brick* to a particular factual setting are abstract in nature, at least at this stage of the proceedings.

Ultimately, petitioners may be most concerned about the rulings of the courts below that they must prove allegations about how prices were fixed on a dealer-by-dealer basis, rather than on a market-wide basis. Petitioners believe the courts below should have accepted their allegations and their presentation of evidence concerning the operation of the market for the sale of gasoline. But the courts below considered the evidence petitioners presented in support of their class certification request and concluded that it was not sufficient to support the view that the market operated uniformly and according to petitioners' theory that respondents were able to fix retail prices, as opposed to prices to dealers.

We recognize that the requirement that petitioners offer proof on a dealer-by-dealer basis increases petitioners' litigation burden considerably and could lead petitioners to terminate a major portion of litigation that has consumed very substantial amounts of

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[8] For example, the district court noted that petitioners' explanations of how respondents exercised control over retail prices "have been very general, somewhat vague, and occasionally inconsistent" (Pet. App. B4).

public resources.[9] However, we are unable to conclude that the question whether petitioners have offered sufficient support for their theory of how this particular market operates warrants this Court's attention at this time. The courts below did not rule that market-wide evidence could never be used to prove how a market operates; rather, they found that the evidence petitioners submitted at the class certification stage failed to support their allegations in the context of this particular case. No judge below disagreed with this largely fact-based conclusion. Further review at this stage might require the Court to sift through the evidence presented by both parties in connection with the motion for class certification. Petitioners have not identified a conflict among the circuits on this issue; and we are not aware that this particular question of method of proof has created such significant difficulties in the lower courts that it warrants this Court's attention.

Moreover, the extent to which the district court's ruling on the application of *Illinois Brick* will make a difference to the course of this litigation is not certain. Regardless of the application of *Illinois Brick*, petitioners will recover damages only if they can prove both the alleged conspiracy and that retail gasoline prices in fact were fixed by some means available to respondents. If petitioners fail to prove a conspiracy, their entitlement to damages will be moot. If they are able to show a conspiracy, they still must prove that respondents in fact fixed retail prices. The courts below obviously were not prepared to accept on the present record petitioners' explanations of how

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[9] The courts below appear to have foreclosed the possibility that petitioners could present additional evidence at trial that would establish on a market-wide basis that respondents controlled retail prices; rather, petitioners must present evidence on some narrower basis (presumably dealer-by-dealer).

respondents were able to fix prices at the retail level when they sold to dealers, not directly to ultimate consumers. See note 8, *supra*. However, the courts have left open the possibility that petitioners could prove that respondents owned or controlled their dealers or that they participated in a resale price maintenance agreement. If petitioners succeed in doing so, the district court might conclude that their claims for damages would not be barred by the *Illinois Brick* rule.[10] In view of these unresolved matters and the overall posture of the case, it seems appropriate for the Court to follow its usual practice of declining to review interlocutory orders. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967). If the question petitioners present does not become moot in the course of the litigation, it will be available for review by this Court when a final judgment has been entered. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

[10] It is conceivable that petitioners could obtain class certification at a later stage of the proceedings, based on development of additional evidence or theories. See Fed. R. Civ. P. 23(c)(1).

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No. 82 - 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO AMICUS BRIEF OF THE UNITED STATES

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd.)

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PETITIONERS' REPLY TO AMICUS BRIEF OF THE UNITED STATES

In its amicus brief, the United States does not quarrel with the substantive arguments made by the plaintiff states in their petition for certiorari. Instead, the United States argues that, "in its current

interlocutory posture, the decision presents no clearly defined legal issue of sufficient general importance to warrant review by this Court." Brief for United States at p. 6. We respectfully disagree with this conclusion.

The fact that our petition arises from an interlocutory appeal does not, of course, disqualify it for Supreme Court certiorari review; this Court can and often does review interlocutory questions decided by the courts of appeals. Certiorari will be granted on interlocutory appeal when, for example, the Court is called upon "to resolve an important and novel question in the administration of the antitrust laws." Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 311. Indeed, in the present case, the fact that these appeals arose under

28 U.S.C. section 1292(b) means that the district court twice certified, and the court of appeals twice agreed, that the district court's orders involved controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may advance the ultimate determination of the litigation.

This is not a case like Brotherhood of Locomotive Firemen v. Bangor and A.R.R. (1967) 389 U.S. 327, cited by the United States to establish this Court's "usual practice of declining to review interlocutory orders." Brief of U.S. at p. 11. There certiorari was denied because, after the court of appeals vacated a contempt order, this Court did not know whether the district court would reinstate the

orders of contempt. Here, both the lower courts have denied petitioners' claims, and nothing can or will change now in the district court following the Ninth Circuit's remand. Nevertheless, the United States suggests that plaintiffs should be required to litigate through an extremely expensive trial (not simply a contempt proceeding) that cannot in any way focus the legal issues raised in this petition, simply to buy an admission ticket to the Supreme Court to find out if the bulk of their claims have any validity.1/ Surprisingly, the United States suggests that this hurdle be placed before

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1/ At least 80% of petitioners' claims, and all of the class members' pre-parens patriae claims, 15 U.S.C. section 16c, were disallowed by the rulings below.

petitioners even though it recognizes that "[t]he court of appeals' decision may well have a significant effect on petitioners' ability to litigate a major portion of this case" (Brief of U.S. at p. 6.) and that "the requirement that petitioners offer proof on a dealer-by-dealer basis increases petitioners' litigation burden considerably and could lead petitioners to terminate a major portion of litigation that has consumed very substantial amounts of public resources." Brief of U.S. at pp. 9-10.

The United States' recognition of the burden of dealer-by-dealer proof is particularly apt. The courts below did not, as the United States suggests at pages 5 to 6 of its brief, find that petitioners failed to tender sufficient evidence of dealer control to avoid

Illinois Brick.[2/] Instead, the court of appeals held that any proof of control must examine individual dealers and thus that class treatment was impossible. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d 1335, 1343. This requirement, that proof of Illinois Brick control must be several orders of magnitude more detailed than proof of the success of the conspiracy, mocks Illinois Brick's attempt to reduce the complexity of economic proof.

We believe that the United States fairly summarizes our contentions at pages 7 to 8 of its brief. However,

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2/ Illinois Brick Co. v. Illinois (1977) 431 U.S. 720 (97 S.Ct. 2061)

we must strongly disagree with the United States' assertion that the court of appeals has foreclosed Supreme Court review of these contentions by failing to address them. As the brief of the United States notes at page 8, fn. 7, the court of appeals did in fact assume that Illinois Brick applied, and both petitioners and respondents recognize that the court of appeals implicitly decided the Illinois Brick question. Thus, while petitioners may theoretically attempt again after trial to coax the court of appeals to decide the issue squarely, from any practical standpoint the questions in this appeal must be decided now or not at all.

We must therefore take issue with the United States' attempt to fit this case within the confines of the rule that "[t]his Court normally does not

review questions that were not decided by the court of appeals." Brief at U.S. at p. 8. The two authorities cited by the United States, United States v. Mitchell (1980) 445 U.S. 535, 546 n.7, and U.S. v. Lovasco (1977) 431 U.S. 783, 788-789 n.7, were in fact both instances where the trial court had not decided the issues brought to the Supreme Court, and this Court deferred ruling until after the trial court had passed on the questions. Here, of course, the trial court has decided the question explicitly and the court of appeals has done so implicitly. When a court of appeals partially decides and partially defers a question, this Court can and does grant complete review when such review would advance the cause of justice, Northwest Airlines, Inc. v. Transport Workers Union of America (1981)

451 U.S. 77, 86, particularly where important questions of statutory interpretation are involved. Id. at fn. 15.

Contrary to the argument of the United States, petitioners do not ask this Court to rule on factual propositions rejected by the court below. Instead, petitioners ask this Court to rule upon the legal implications of facts not in dispute. In particular, petitioners contend that the tautological conclusion that each dealer bought its branded gasoline exclusively from its franchisor implies, as a matter of law, that the Illinois Brick rule should not be read to deny claims for purchases from dealers. Secondarily, if this contention is rejected, the petitioners maintain that Illinois Brick control is established in this case by the dealers'

exclusive supply arrangements with their respective franchsors and by the observed and undisputed fact that, when respondents "restored" gasoline prices to higher levels, the dealers' retail prices moved from a relatively dispersed statistical range at the competitive level to a narrow, tightly confined statistical range at the supracompetitive level. These legal contentions were rejected by the court of appeals when it accepted the premise that Illinois Brick applied and insisted that Illinois Brick control cannot, under any circumstances, be proved on a marketwide basis.

In summary, we submit that the United States has grasped the important legal issues raised by our petition but has failed to recognize the deleterious effect on civil antitrust enforcement that a denial of certiorari would

create. The legal issues raised by the petition vitally affect the application of the antitrust laws to major segments of the American economy--not just to the oil industry, but to all branded franchise operations. The essence of branded franchising is supplier control over the franchisee's economic activities. Our petition asks, for the first time, whether Illinois Brick should bar retail recovery in a market in which branded franchisees can purchase their branded product from only their franchisors, who conspired horizontally to raise the retail price level at which both the franchisors and the franchisees sold the product to the public.

When Hanover Shoe and Illinois Brick were decided, the Court could assume that restrictive practices by branded franchisors would always be

subject to attack by franchisees. But, in the wake of Continental T.V. v. G.T.E. Sylvania (1977) 433 U.S. 36, and this Court's present consideration of Monsanto Co. v. Spray-Rite Service Corp., Dkt. No. 82-914, and Copperweld Corp. v. Independence Tube Corp., Dkt. No. 82-1260,3/ which have allowed or might allow franchisors increased control over the competitive activities of their dealers, that potential challenge has been diminished and consequently antitrust

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3/Copperweld raises the question of whether a parent and a wholly owned subsidiary are independent economic units for the purposes of antitrust combination. By analogy, major oil company branded franchising of gasoline is arguably a single economic enterprise substantially controlled by the oil company.

enforcement has been weakened. The time is unquestionably ripe for a review of the way the Illinois Brick rule constrains the power of the dealers' customers to vindicate the antitrust laws. By this petition, we urge the Court to undertake this review.

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